119-341

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1885.**

No. ~~309~~ 59

JOHN HALSTED, PLAINTIFF IN ERROR,

*vs.*

SARAH A. BUSTER AND MARY A McGEE (LATE MARY A. BUSTER.)

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

**FILED SEPTEMBER 25, 1883.**

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## OCTOBER TERM, 1885.

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## No. 302.

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*vs.*

SARAH A. BUSTER AND MARY A McGEE (LATE MARY A. BUSTER.)

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 Pleas before the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, at Charleston, May 30, 1883, and in the 107th year of the Independence of the United States of America.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of said court at Charleston on the first Monday in August, 1873, came John Halstead, a citizen and inhabitant of the State of New York, by Abraham Burlew, Esq., his counsel, and filed his declaration in ejectment (together with the notice thereto attached and the marshal's return thereon), and specification of damages against William B. Buster and Eldridge Barrett, which declaration, specification, notice, and marshal's return are in the words and figures following, to wit:

*Declaration.*

In the District Court of the United States for the District of West Virginia, holden at Charleston, in said State.

John Halstead, a citizen of the city of New York and of the State of New York, complains of William B. Buster and Eldridge
2 Barrett for that heretofore, to wit, on the first day of February, 1873, the said plaintiff was possessed in fee of a certain tract or parcel of land lying and being in the county of Fayette and State of West Virginia, which land was conveyed by Robert Soulter, trustee, to John Halstead on the 6th of June, 1864, but which land is more particularly described in a deed from William K. Smith and Anderson G. Grinnan to the Forest Hill Mining and Manufacturing Company, dated on the 15th day of June, 1867, as follows, to wit: Beginning at a point marked "A" in the middle of the northern line of the old Forest Hill tract; thence N. 23° W. 193 poles to two chestnut oaks on a ridge between Armstrong and Morris creeks and corner to the lands of Paint Creek Company; thence along the top of the ridge S. 87° W. 40 poles to two chestnuts, S. 59° W. 42 poles to a tall white oak, S. 32° W. 54 poles to a chestnut, S. 12° W. 61 poles to a black oak, S. 60° W. 32 poles to a white oak, S. 26° W. 34 poles to two chestnut oaks, S. 48° W. 23½ poles to a chesnut, S. 64° W. 53 poles to a dogwood, S. 11° W. 26 poles to a white oak, S. 61° W. 106 poles to a gum, S. 10° W. 18 poles to a chestnut, S. 44° W. 21½ poles to a stake, S. 57° W. 45 poles to a hickory, S. 45° W. 26 poles to a small locust, S. 15° W. 24 poles to a chestnut oak, S. 42 poles to a chestnut oak, S. 28° E. 90 poles to a black oak, S. 84° W. 18 poles to a stake, S. 60 W. 41
3 poles to a chestnut, S. 66° W. 44 poles to a black oak, N. 83° W. 36 poles to a chestnut, S. 43° W. 82 poles, N. 87° W. 28 poles to three chestnuts, N. 82° W. 60 poles to a black oak, S. 50° W. 20 poles to a white oak, S. 12° W. 20 poles to a stake, S. 5° W. 41 poles to a white oak, N. 86° W. 32½ poles to a chestnut, S. 35° W. 59 poles to a chestnut oak at the head of Morris creek; thence along the ridge between Paint and Armstrong creeks S. 30° W. 69 poles to a chestnut, S. 55° E. 24 poles to a chestnut oak, N. 80° E. 25 poles

to two chestnut oaks, S. 65° E. 25 poles to a pine, N. 80° E. 56 poles to a white oak, S. 16° E. 102 poles to a chestnut oak, S. 20° W. 48 poles to a chestnut, S. 45° W. 80 poles to a chestnut, S. 33° E. 32 poles to a chestnut oak, S. 20° W. 77 poles to a chestnut oak and pine, S. 16° E. 50 poles to a chestnut, S. 5° W. 47 poles to a chestnut oak at the head of Ash Camp branch, S. 50° E. 66 poles to a chestnut oak, N. 67′ E. 24 poles to a chestnut, S. 87° E. 24 poles to a chestnut, S. 67° E. 24 poles to a chestnut, S. 2′ W. 34½ poles to a chesnut oak, S. 14° W. 44 poles, S. 23° E. 41 poles to a chestnut, N. 84° E. 185 poles; thence N. 6° W. 450 poles; thence N. 31° E. 900 poles to the beginning; also a certain parcel of land bounded on the south by the foregoing boundary, on the north by the Great Kanawha river, being the westerly part of the Huddleston survey by a line
4 running from the northerly to the southerly side of the same, containing about one hundred acres, being a part of the tract known as the Huddleston tract.

And, being possessed of the whole of the foregoing described land, the defendants afterwards, to wit, on the 10th day of February, 1873, entered into said premises and unlawfully withheld from said plaintiff the possession thereof to his damage of $5,000.00.

JOHN HALSTEAD,
By A. BRULEW, *His Att'y.*

*Notice.*

To William B. Buster and Eldridge Barrett, defendants in the foregoing suit:

Take notice that the above declaration in ejectment against you and specification of damages will be filed in the office of the clerk of the district court of the United States for the district of West Virginia, holden at Charleston, at rules, on Monday, the 4th day of August, 1873, at which time and place you can appear if you think proper, and that if you fail to appear and plead thereto within the time required by law, judgment will be given against you.

JOHN HALSTEAD,
By A. BRULEW, *Att'y.*

June —, 1873.

*Specification.*

5 William B. Buster & Eldridge Barrett, Dr., to John Halstead.

To damages for destruction of property described in plaintiff's declaration as follows:

| | |
|---|---|
| To one thousand trees at $2 per tree | $2,000 00 |
| To damages to land | 2,000 00 |
| | $4,000 00 |

The plaintiff, John Halstead, will claim damages as above stated on the trial of this cause.

JOHN HALSTEAD,
By A. BRULEW, *Att'y.*

*Return.*

Served within declaration, notice, and specification of damages on William B. Buster on this 29th day of July, 1873, by delivering to him a true copy of the same, and on Eldridge Barrett on this 29 day of July, 1873, by delivering to his mother, a free white person & member of his family, & above the age of 16 years, at his usual place of abode, a true copy of the within, and explaining to her the purport thereof, the said Barret — not at home and not found.

WM. BROWN,
*Deputy for H. Slack, Mar.*

Whereupon it appearing that the defendants, W. B. Buster and Eldridge Barrett, have been duly served with copies of the foregoing declaration, specification, and notice, and they failing to appear, on motion of the plaintiff, it was ordered that judgment be entered
6 in favor of the plaintiff against the defendants for the premises described in the declaration, unless they should appear and plead to issue at the then next rules.

At which day, to wit, at rules held as aforesaid in said clerk's office on the first Monday in September, 1873, came again the plaintiff, by his said attorney, and on his motion, and the defendant still failing to appear, it was ordered that the order made at the last rules in this cause be confirmed.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, December 24th, 1873:

This day came the parties, by their attorneys, and thereupon the defendants for plea say that they are not guilty of unlawfully withholding from the plaintiff the premises, as in the plaintiff's declaration it is alleged; to which plea the plaintiff replies generally and puts himself upon the country, and the defendants do the like; and, on motion of the defendants, the office judgment obtained at rules is set aside. And by consent of the parties it is ordered that Surveyor A. P. Sinnett do go upon the lands in controversy in this
7 action and do such surveying as either party may require, and that he return to this court five reports and seven fair plats; but before commencing such surveying the surveyor shall give to the parties or their attorneys reasonable notice of the time and place of commencing such surveying.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 8, 1874:

This day came the parties, by their attorneys, and, on motion of the plaintiff, it is ordered that the surveyor, Abel P. Sinnett, do such further and additional surveying on the land in controversy as either party may require and report in accordance with the provisions of the order of survey heretofore entered in this cause; and, on motion of the defendants, it is ordered that the plaintiff give bond, with good security, for costs in this cause before the clerk of this court within 60 days from this date, and on his failure so to do this cause shall be dismissed.

And at another day. to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 24, 1876:

This day came the parties, by their attorneys, and, on
8 motion of the defendants, and at their costs, this cause is continued until the next term. And Samuel Estep, a witness duly summoned in this cause at this term on behalf of the plaintiff, being called, and not appearing, on motion of plaintiff, a rule is awarded against said witness, returnable here on the 2d day of the next term, to answer for his said contempt.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 6, 1878:

This day came the parties, by their attorneys, and thereupon the death of the defendant, Wm. B. Buster, is suggested upon the record, and, by consent of the parties, this cause is revived in the name of Mary A. Buster and Sarah A. Buster, heirs-at-law of said Wm. B. Buster, dec'd, to proceeded in against them to final determination, and this cause is continued.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, June 7, 1879, for reasons appearing to the court this cause is set for trial on the 9th day of the next term, to which time this cause is continued.

9 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 16, 1881:

On motion of the plaintiff, by his attorney, T. S. Robson is hereby appointed assistant surveyor in this cause to act with A. P. Sinnett, heretofore appointed, and they are hereby directed to do such further surveying in this cause as either party may require, and report the same to court with maps, first giving ten days' previous notice to counsel of record in this suit before beginning said survey. And said surveyors are ordered and directed to lay down on the maps already filed in this cause the entire Wilson and Gallatin surveys under which the respective parties claim to hold. And this cause is continued at the costs of the plaintiff.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston May 8th, 1882:

The defendants, Sarah A. Buster, Mary A. McGee, formerly Mary A. Buster, disclaim title to all the lands in the plaintiff's declaration mentioned and described, except the following parcel, to wit: Be-
10 ginning at the point marked "B" on the plat marked X and filed in this cause by A. P. Sinnett, surveyor; thence with the blue line to the point "D;" thence with the red line to the point "J" on the top of the ridge between the waters of Armstrong creek and Morris creek, a poplar tree standing at said point,

the said point being on the outer line of the Gallatin 2,000 acres; thence with the top of said ridge towards the Kanawha river to the point "P;" thence with the red line *to;* thence by the blue line to the place of beginning at the point "B."

And at the same day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston the day and year last aforementioned:

This day came the parties by their attorneys; and thereupon came a jury, to wit, John N. Conley, A. W. Mann, Jacob Fry, Geo. E. Sampson, George A. Stephenson, J. M. McWhorter, James T. Rucker, Reuben Harrison, John H. Atkinson, John T. Gibson, Shryner Stover, and Gloud W. Kennedy, who, being selected by lot, tried and sworn the truth to speak upon the issue joined, and having partly heard the evidence, and there not being time to finish the trial of this cause this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

11 And at another day of the same term, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 9, 1882:

This day came the parties by their attorneys, and the jury impaneled in this cause at a former day of the term appeared pursuant to their adjournment, and having heard the evidence, and there not being time to finish the trial of this cause this day, the jury are adjourned over until to-morrow morning at nine o'clock.

And at another day of the same term, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 10, 1882:

This day came the parties by their attorneys, and on motion of the plaintiff it is ordered that this cause cause be dismissed as to the defendant, Eldridge Barrett. And thereupon the jury impaneled and sworn in this cause appeared in court according to their adjournment on yesterday, and, having fully heard the evidence and arguments of counsel, retired to their chamber to consider of their verdict, and after some time returned into court and upon their oaths do say, "We, the jury, find for the defendants." Therefore it is considered by the court that the defendants be discharged and go hence
12 without day, and that the plaintiff be in mercy, &c., and that the defendants recover against the plaintiff their costs by them about their defense in this behalf expended.

And at another day of the same term, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 20, 1882:

This day came again the parties by their attorneys, and it appearing that the judgment entered on the verdict rendered in this cause at a former day of this term having been so entered without the direction of the court thereto, the said judgment is set aside and held for naught. And thereupon the plaintiff, by his attorney, moved the court to set aside the verdict of the jury returned in this cause

at this term and grant him a new trial herein; of which motion the court takes time to consider, and this cause is contined until the next term.

13 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston May 30, 1883:

This day came again the parties, by their attorneys, and the motion heretofore made by the plaintiff to set aside the verdict of the jury rendered herein, and to award him a new trial, being argued and considered by the court, is overruled.

It is therefore considered by the court that the defendants be discharged and go hence without day, and that the plaintiff be in mercy, &c, and that the defendants recover against the plaintiff their costs by them in this behalf expended, including in said costs the sum of $10, the fee of D. C. Gallaher, Esqr., who, at the instance and by the direction of the court, recorded certain testimony, given in court upon the motion aforesaid.

Memo: Be it remembered that upon the trial of this cause the plaintiff, by his attorney, tendered his bills of exceptions marked Nos. 1 & 2, which are here signed and sealed and ordered to be made a part of the record in this cause.

Bill of exceptions marked No. 1 is in the words and figures following, to wit:

14 Be it remembered that on the trial of this action before the jury, the plaintiff, to maintain the issue on his part, read in evidence a copy of a survey and accompanying plat made April 14, 1795, for William Wilson of 85,600 acres of land in the words and figures following, to wit:

Surveyed for William Wilson eighty-five thousand six hundred acres of land in Kanawha county on S. W. side of the Great Kanawha river joining surveys made for Albert Gallatin & Co at and near the Great Falls of said river extending down, back of, and with said surveys so as to include some of the waters of Cabin creek by virtue of the following land office treasury warrants, viz: 4 warrants of 20,000 acres each, Nos. 782, 783, 784, 785, and 5,600 acres of a warrant for 20,000, N. 791, all dated the 14th Oct., 1794, and is bounded as followeth, viz: Beginning at two beech trees in the forks of a branch running into Cabin creek, about ¼ of a mile below Flin's Cabin, and running thence S. 55° E. 350 poles to a poplar and red oak on the top of a ridge; thence S. 65° E. 286 poles, crossing a branch at 80 poles to 2 gums on the east side of a hill; thence S. 85° E. 1,760 poles to two chestnut trees growing from one root, crossing waters at the following distances from each other: at 120

15 poles, Paint creek; at 400 poles, a branch; 440 po's, at 500 poles, at 260 poles—s'd 2 chestnuts; thence S. 24° E. 732 poles to a beech in the forks of Armstrong's creek about 6 poles from the left-hand fork of the same, being corner to Albert Gallatin's survey of 2,000 acres, crossing water at 360 poles; thence S. 66° E. 1,366 poles, crossing Loop creek to a hickory on a hillside, corner to said Gallatin survey of 3,000 acres; thence with a line of the same N. 74° 30′ east 798

poles to a gum & maple in the forks of a branch, corner to the same; thence leaving said survey and running east 724 poles to 2 Spanish oaks about 40 poles from the Great Kanawha river, crossing water at 420 poles; thence south 15° west 504 poles to a poplar and maple in a flat, crossing water at 220 poles; thence S. 50° W. 152 poles to a Spanish oak & dogwood on the point of a ridge, crossing water at 20 poles; thence S. 20 W. 432 poles to two chestnut oaks on the top of a ridge, crossing waters at the following distance, 120 poles; thence S. 10 E. 560 poles to two white oaks on the point of a ridge, crossing waters at the following distances: At 140 poles, 180 poles, & 200 poles, waters of Laurel creek; thence S. 40° W. 2,020 poles to a poplar and maple in a hollow about 20 poles from a branch of
16 Paint creek, crossing waters at the following distances: 160 poles, 140 poles, 100 poles, 160 po's, 360 poles, 660 poles to Loop creek; 360 poles, & 600 poles to the said maple and poplar; thence N. 70° W. 4,548 poles to a beech and sugar tree on the bank of Raccoon creek, a branch of Cabin creek, crossing waters at the following distances: 400 poles, 320 poles, 240 poles, 320 poles, 1,040 poles, 100 poles to Paint creek; 420 poles. 500 poles, waters of Paint creek; 720 poles to Cabin creek; 488 poles to the s'd beech & sugar tree; thence N. 9° 30′ E. 2,980 poles to the beginning, crossing waters at 340 poles, 300 poles, 240 poles, 200 poles, 300 poles, 540 poles, 100 poles, 500 po's, 460 poles to the said beginning, including 6,786 acres of prior claims, for which there is an allowance made in the calculation 14th Ap'l, 1794.

AND'W JOHNSTON, *Ass't.*
REUBEN SLAUGHTER, *S. K. C.*

A copy.
Teste:

JOEL S. QUANIER,
*Cl'k Kanawha County C't.*

I, Thomas Swinburn, deputy for S. Chapman, surveyor of Kanawha county, West Virginia, hereby certify that the date of the above survey, as recorded in the original surveyor's book of Kanawha county No. 1 in my office, is April 14, 1795.

Given under my hand this 9th May, 1882.

THOMAS SWINBURN,
*Deputy for S. Chapman, S. K. C.*

(Here follows diagram marked p. 16.)

17 Also a copy of a grant from the Commonwealth of Virginia to Benjamin Martin, assignee of William Wilson, for 85,600 acres of land, dated 1st January, 1796, in the words and figures following, to wit:

Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that by virtue of land office treasury warrants No-. 782, 783, 784, 785 and 791, issued the 14th day of October, 1794, there is granted by the said Commonwealth unto Benjamin Martin, assignee of William Wilson, a certain tract or parcel of land con-

taining eighty-five thousand six hundred acres, by survey bearing date the 14th day of April, 1795, lying and being in the county of Kanawha, on the southwest side of the Great Kanawha river, joining surveys made for Albert Gallatin at and near the Great Falls of said river, and extending down back of and with the said surveys, so as to include some of the waters of Cabin creek, and is bounded as followeth, to wit: Beginning at two beech trees in the fork of a branch running into Cabin creek about a quarter of mile below Flin's Cabin, and running thence S. 55° E. 350 poles to a
18 poplar and red oak on the top of a ridge; thence S. 65° E. 286 poles, crossing a branch at 80 poles, to two guns on east side of a hill; thence S. 80° E. 1,760 poles to two chestnut trees growing from one root, crossing waters at the following distances from each other, to wit: at 120 poles, Paint creek; 400 poles, a branch; at 440 poles, 500 poles, 260 poles, to the two chestnuts; thence S. 24° E. 732 poles to a beech in forks of Armstrong's creek about six poles from the left hand fork, the same being corner to Albert Galentine's survey of 2,000 acres, crossing water at three hundred and sixty poles; thence S. 66° E. 1,366 poles, crossing Loop creek to a hickory on a hillside, corner to said Galentine's survey of 3,000 acres; thence with a line of the same N. 74½° E. 798 poles to a gun & maple in the forks of a branch, corner to the same; thence leaving said survey and running east 724 poles to two Spanish oaks about 40 poles from the Great Kanawha river, crossing waters at 420 poles; thence S. 15° W. 504 poles to a poplar and maple in a flat, crossing waters at 220 poles; thence S. 50° W. 152 poles to a Spanish oak and dogwood on the point of a ridge, crossing waters at 20 poles; thence S. 20° W. 432 poles to two chestnut oaks on the top of a ridge, crossing waters at the following distance, 120 poles; thence S. 10° E. 560 poles to two white oaks on the point
19 of a ridge, crossing waters at the following distance-: 140 poles, 180 poles, and 200 poles, waters of Laurel creek; thence S. 40° W. 2,020 poles to a poplar and maple in a hollow, about 20 poles from a branch of Paint creek, crossing waters at the following distance-: 160 poles, 140 poles, 100 poles, 160 poles, 360 poles, 660 poles to Loop creek; 360 poles and 600 poles to the said maple and poplar; thence N. 70° W. 4,548 poles to a beech and sugar tree on the bank of Raccoon creek, a branch of Cabin creek, crossing waters at the following distance-: 400 poles, 320 poles, 240 poles, 320 poles, 1,040 poles, 100 poles to Paint creek; 420 poles, 500 poles, waters of Paint creek; 720 poles to Cabin creek; 488 poles to the said beech and sugar tree; thence N. 9° & 30′ E. 2,980 poles to the beginning, crossing waters at 340 poles, 300 poles, 240 poles, 200 poles, 300 poles, 540 poles, 100 poles, 500 poles, 460 poles to the said beginning. But it is always to be understood that the survey upon which this grant is founded includes 6,786 acres of prior claims (exclusive of the above quantity of 85,600 acres), which, having a preferance by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants, and this grant shall
20 be no bar, in either law or equity, to the confirmation of the

title or titles to the same, as before mentioned and reserved, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Benjamin Martin (except as before excepted), and his heirs, forever.

In witness whereof the said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the first day of January, in the year of our Lord one thousand seven hundred and ninety-six, and of the Commonwealth the twentieth.

ROBERT BROOKE.

LAND OFFICE, RICHMOND, VA.

The foregoing is a true copy from the records.

Witness my hand and seal of office this 23d day of August, 1875.

[L. S.] S. H. BOYKIN,
*Reg. L. Office.*

Also sundry deeds and wills, beginning with a deed from Benjamin Martin, which transferred, conveyed, and devised to
21 the plaintiff all the title acquired by Martin under his said grant in and to the land described in his declaration in this cause.

Also an agreement in writing, signed by Mollohan and Fontain, att'ys for defendant, and A. Brulew, att'y for plaintiff, endorsed "Agreement made concerning certain maps," &c., in the words and figures following, to wit:

JOHN HALSTEAD
*vs.*
HEIRS OF WILLIAM B. BUSTER, Dec'd. } In Ejectment.

It is agreed between the plaintiff and defendants to the above-entitled action of ejectment, now pending in the United States district court at Charleston, West Virginia, that on the trial thereof no evidence need be introduced by either party of the identity of the Wm. Wilson survey of 85,600 acres or of the Gallatin and Savary survey of 2,000 acres, but the courses and distances thereof shall be assumed to be correctly laid down by A. P. Sinnett on the maps and plats filed by him in said cause, marked 1, 2, 3, &c., under an order made in said cause at the last term of said court.

This agreement is not, however, to preclude either party
22 from raising and insisting on any matters of law by virtue whereof the courses and distances of said surveys, or either of them, may be required to yield to any other calls mentioned in said surveys respectively.

And we accept the said plats in lieu of extending the said surveys upon the plats made and heretofore filed by Surveyor Sinnett in this cause as required by the order made in this cause on the 16th day of November, 1881.

MOLLOHAN & FONTAINE,
*Att'ys for Defendants.*
A. BRULEW, *Att'y for Plaintiff.*

Also the report and plat of survey made and filed in this action by A. P. Sinnett, surveyor, under an order made in this action on the — day of ——, 18—, which report is in the words and figures following, to wit, "No. 1," &c.:

In the District Court of the United States for the District of West Virginia. In Ejectment.

JOHN HALSTEAD *vs.* WM. B. BUSTER & ELDRIDGE BARRETT.

In obedience to an order of said court made at the fall
23 term thereof, at Charleston, West Va., in the above-named cause, a copy of which said order attends this report, and made Exhibit No. 1 (see page — of this record for said Exhibit No. 1), the undersigned, special surveyor for said court, did, on the 24th day of March, 1874, after having given notice to the parties of the time and place of commencing said survey, a copy of which notice attends this report, and made Exhibit No. 2 at th- instance of the plaintiff's counsel, proceed to execute said order. I went to the house of James R. Buster, and from thence to a beech tree on Armstrong's creek, about 85 poles above the first forks, and designated by letter A on the accompanying plat, and claimed by the plaintiff as a corner to a survey of 85,600 acres made for Wm. Wilson, and corner to a survey of 2,000 acres made for Albert Gallatin and Savary DeValcolon—present, James R. Buster, Dr. Chas. F. Hale, A. Brulew, counsel for plaintiff, and W. Molohan, counsel for the defendants—with R. E. Wescott and Willis Sinnett as my chain men, at the instance of the plaintiff's counsel, I run thence S. 41 E. 3 poles & 16 links to the bank of Armstrong's creek, the spot shown to me by James R. Buster as the place where the original beech once stood.

I then run the call of the Wilson line reversed, with a varia-
24 tion of 2° east N. 22′ W., crossing the Tucker fork of Armstrong's at 120 poles—course continued—in all, 167 poles, and found 2 poles to my left at (B), two black oaks and a birch marked with three chops on three sides, viz., on the side S. 22° E., on the side about N. 22 W., and on the side facing S. 31 W., and claimed to be corner between the Forrest Hill and the Elk Ridge tracts—same course, N. 22° W., continued—in all, 327 poles, to two chestnut oaks on the top of the dividing ridge between Armstrong and the Skylar fork of Morris creek at (C), and corner to Forrest Hill tract. I then, at the instance of A. Brulew, counsel, &c., began at the two black oaks and birch at (B), and ran thence S. 31 W. 42 poles to Tucker fork—course continued—in all, 77 poles, to the intersection of said line with the Gallatin line at (D). I then began on said line where it crosses Tucker fork, and run thence up said *said* fork S. 89 W. 58 poles to the improvement of Barrett on the S. E. side of said branch—in all, 78 poles—to Barrett's house at (E). The plaintiff's counsel not requesting any further surveying done I stopped surveying on the

the beech at (A) and run for the reverse of the last course of
25 the Gallatin and Savary 2,000 acres, N. 449½ W. 125 poles to the line of the Forrest Hill tract at (D), course continued, crossing Tucker fork at 178 poles just below Barrett's house, in all, from said beech, 342 poles, to a poplar and two chestnut oaks on the top of the dividing ridge at (J); thence following along on the top of said ridge, as shown upon the plat, to the top of the rocky ledge on point ridge at (K); thence down said point ridge to a fallen walnut on Armstrong's creek at (L). The defendants not wanting any further surveying done I stopped the survey upon the part of the defence at this point.

At the request of the plaintiff's counsel I went to the beech at (A) and ran the second call of a patent to J. R. Buster for 97 acres; thence N. to 6 W.; I ran it with 30′ variation to the right N. 5½ W, crossing Tucker fork at 92 poles—course continued—in all, 224 poles, for a white oak and gum; the distance terminated on the southeast hillside facing main Armstrong's creek at (M); (corner not found).

I found no marks upon this line at the termination of the distance, and about 2 poles to my right stand two white oaks; one of said oaks has three chops of an axe on the side facing about west;
one of said chops is about 2½ feet from the ground; the other
26 two are about three inches from each other and 12 or 14 inches above the first; I did not block this tree; the marks are too young for the Buster survey, say not more *more* than 10 or 12 years old; there has been oak timber—several trees—cut and taken away for timber, as I suppose, in the immediate vicinity of the termination of this line. I then run the 3d call of said patent S. 47½ W., crossing the head of Log hollow and over a point and crossing the Wilson line at 72 poles, and crossing the head of a hollow of Tucker's fork, in all 92 poles, for two chesnut oaks and white walnut; the distance terminated on a point ridge facing Tucker's fork at (N); (corner not found); no marks found upon this line. I then run for the 4th call of patent S. 8½ W. 42 poles for a poplar and birch; distance terminated on a hillside near the Tucker's fork at (O). I did not find this corner or any marks upon this line. I then *then* run for the last call of the patent S. 7½ E., crossing Tucker's fork at 14 poles, and stopped surveying.

Pursuant to notice given, at the request of plaintiff's counsel, I went on the 6th of August, 1874—I went to the house of James R. Buster on Armstrong's creek, and, being informed that Dr. Chas. F.
Hale was absent from home, I adjourned the survey until
27 August the 11th. Tuesday, 11th August, 1874, pursuant to adjournment, I went to the beech tree at (A) on Armstrong's creek corner to Wilson, Gallatin, and Buster. Present, J. R. Buster, Wm. B. Buster, Dr. Chas. F. Hale, David Mahood, and —— Anderson. In accordance with instructions of plaintiff's counsel and also of Dr. C. F. Hale, with said Mahood and Anderson as my chainmen, I ran the second call of a patent to Jas R. Buster for 97 acres

main Armstrong's creek, at (M), corner not found. I hunted for marks, and could find no marks as corner or line trees. There has been timber cut about the termination of this line. I then run the 3d call of patent S. 47½ W. 92 poles for two chestnut oaks and white walnut. The distance gave out on a point ridge at (N), facing the Tucker fork. I found no marks upon this line and found no marks as corner trees at or near the point (N). There is chestnut oak timber near the termination of this line, but I found — upon it. I then

28 *I then* ran the 4th call of patent S. 8½ W. 42 poles for a poplar and birch. The course and distance terminated on a hill near Tucker fork, at (O), corner not found and no marks found upon this line. I then ran the last call of patent S. 7½ E., crossing Tucker fork at 14 poles; course continued by protraction in all 150 poles to (I), thence N. 65½ E. 80 poles to A, the place of beginning.

*Remarks.*

The lines on the accompanying plat shaded blue are intended to represent the land claimed by the plaintiffs.

The lines represented by the letters A, J, P, Q, & to A, and shaded red, are intended to represent a tract of land claimed by William B. Buster.

The lines represented by the letters T, K, L, O, and to P, and shaded yellow, are intended to represent a tract of land claimed by James R. Buster.

The lines represented by letters A, M, N, O, I, & to A, and shaded green, are intended to represent a tract of 97 acres claimed by James R. Buster, and ran, according to the patent calls, from the beech at A.

All of which is respectfully reported.

A. P. SINNETT,
*Special Surveyor for Dist. Ct. U. S. for Dist. W. Va.*

And said plat is endorsed "Exhibit B," in the words, letters, lines, and figures following, to wit:

(Here follows diagram marked p. 28.)

29 Also the plat filed in this action by A. P. Sinnett, surveyor, on the 24th of April, 1882, marked "Plat No. 4," in the words and figures following, to wit:

(Here follows diagram marked p. 30.)

31 And it was admitted by the respective parties, in the presence of the jury, that the said William Wilson survey of 85,600 acres and the Gallatin and Savary survey of 2,000 acres hereinafter mentioned are correctly laid down on the said plat made by A. P. Sinnett, marked "No. 4," and form an interlock, as there represented.

It was also admitted by the respective parties to this action, in the presence of the jury, that the lands claimed by the plaintiff and described in his declaration, and represented and inscribed on said

Area 8000 acres

map within the lines shaded blue as the "Forest Hill Tract," and that said lands are correctly laid down on said map.

And it was admitted by the defendants, in the presence of the jury, that they were in possession of all the lands described in the declaration and claim title thereto, except that part thereof for which they have filed a written disclaimer in this action, which is in the words and figures following, to wit:

(For said disclaimer see page 9 of this record.)

32 The plaintiff introduced evidence tending to prove that he and those under whom he claims have been in occupation of the lands described in the declaration by actual occupancy of the same since the year 1860.

It was also proved by the plaintiff that the beginning corner in the grant to Martin for the 85,600 acres is designated on the said map filed by A. P. Sinnett by the index pointing to the corner marked "2 beeches."

That the fourth call in said grant for "two chestnut trees growing from one root" is represented on the Martin line within the said Gallatin and Savary grant at "2 chestnuts" which were
33 found and located on the ground, and that the call in the Martin grant "to a beech in the forks of Armstrong's creek," "corner to Albert Gallatin's survey of 2,000 acres," is represented on said map at the point "A."

The defendants to maintain the issue on their part read in evidence an entry dated the ——, in the words and figures following, to wit:

(Entry not found on file in the papers.)

34 Also a copy of a survey for 2,000 acres, made on the aforesaid entry, dated the 24th of August, 1794, in the words and figures following, to wit:

Surveyed for Albert Gallatin and Savary De Valcoulon 2,000 acres of land in Kanawha county on the S. W. side of the Great Kanawha river, joining a survey made for William Morris of 500 acres, and near the upper end of a survey of 359 acres for Andrew Donnally, and the lower end of a survey made for James Armstrong, by virtue of a land office treasury warrant for 2,000 acres, No. 17562, issued to Richard Clai the 30th June, 1783, and is bounded as followeth, (to wit):

Beginning at a beach on Armstrong's creek above the first forks of said creek about 80 poles up from said fork and about 6 poles from the largest fork on the right-hand side thereof, thence down the creek N. 34° E. 325 poles to a sugar tree & elm, N. 31° W.
35 192 poles to a birch & lynn corner to William Morris, thence with his line N. 57 W. 945 to two white oaks near Donally's

line, S. 53° W. 280 poles to sycamore on a creek, thence S. 49 E. 1,200 poles to the beginning.

24th Aug't, 1794

REUBEN SLAUGHTER, *S. K. C.*

Copy.

Teste:

THOMAS SWINBURN,
*Dep. for S. Chapman, S. K. C.*

Fee, $1.00.

Also a copy of a grant from the Commonwealth of Virginia to Albert Gallatin and Savary DeValcoulon for 2,000 acres, dated 22d July, 1795, in the words and figures following, to wit:

Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that by virtue of a land-office treasury warrant, number seventeen thousand five hundred and sixty-two, issued the thirtieth day of June, one thousand seven hundred and eighty-three, there is granted by the said Commonwealth unto Albert Galatine and Savary DeValcoulon a certain tract or parcel of land containing two
36 thousand acres, by survey bearing date the twenty-fourth day of August, one thousand seven hundred and ninety-four, lying and being in the county of Kenhawa, on the southwest side of the Great Kenhawa river, joining a survey made for William Morris of five hundred acres, and near the upper end of a survey made for Andrew Donally of three hundred and fifty-nine acres, and the lower end of a survey made for James Armstrong, and is bounded as followeth, to wit: Beginning at a beech on Armstrong's creek above the first forks of said creek about eighty poles up from the fork and about six poles from the largest fork on the right-hand side thereof; thence down the creek north thirty-four degrees east three hundred and twenty-five poles to a sugar tree and elm, north thirty-one degrees west one hundred and ninety-two poles to a brick and lynn corner to William Morris; thence with his line north fifty-seven degrees west nine hundred and forty-five poles to two white oaks; thence leaving his line and running south fifty-three degrees west two hundred and eighty poles to a sycamore on a branch; thence south eighty-nine degrees east twelve hundred poles to the begin-
37 ning, with its appurtenances; to have and to hold the said tract or parcel of land with its appurtenances to the said Albert Gelatine and Savary DeValcoulon and their heirs forever.

In witness whereof the said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the twenty-second day of July, in the year of our Lord one thousand seven hundred and ninety-five and of the Commonwealth the twentieth.

ROBERT BROOKE.

LAND OFFICE, RICHMOND, VIRGINIA.

The foregoing is a true copy from the records.

Witness my hand and seal of office this 27th day of April, 1877.
[L. S.] S. H. BOYKIN,
*Reg'r Land Office.*

And it was agreed in open court, in the presence of the jury, by the respective parties to this action, that the Gallatin and Savary title to the land described in said last-mentioned grant was, on or before March 22, 1842, forfeited to the Commonwealth for the
38 non-payment of taxes due thereon, and for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law.

The defendants also read in evidence a copy of proceedings had in Fayette county concerning the aforesaid forfeiture in the words and figures following, to wit:

At a circuit superior court of law & chancery held for the county of Fayette, at the court-house, on Monday, the 3d day of April, 1839.

Present, the Honorable Edwin S. Duncan, one of the judges of the general court, and of the 9th judicial circuit.

The court appointed Alfred Beckley com'r of delinquent and forfeited lands in the place of Wm. Carnifix, resigned, who thereupon, with Wm. Carnifix and Aaron Stockton, his security, entered into and acknowledged a bond in the penalty of $1,000, with conditions according to law, and also took the oath prescribed by law.

And at another day, to wit, at a circuit superior court of law and chancery continued and held for the county of Fayette, on
39 Saturday, the 2d day of April, 1842, the commissioner of forfeited and delinquent lands for Fayette county this day made a report in writing that a tract of land containing 2,000 acres, patented to Albert Gallatin and Savary de Vancoulon (*alias*) John Savary, is forfeited for reasons stated in the report, and the report by the court is ordered to be filed, and it is ordered that the commissioner do make sale of the said land at the next June term of Fayette county court on the terms and according to the provisions of the acts of assembly in such cases made and provided, and that he report his sales to the court.

And on another day, to wit, at a circuit superior court of law and chancery, continued and held for the county of Fayette on Thursday, the 1st day of September, 1842, the commissioner of forfeited and delinquent lands this day made a report of the sale of a tract containing 2,000 acres patented Albert Gallatin and John De
40 Vancoulon *alias* John Savary, at which sale James Morris for himself *et al.* became the purchasers at the price of one hundred dollars, one-fourth part of which was paid in hand, and the purchasers' bond taken for the residue. It is adjudged and ordered that the sale be confirmed, and the commissioner, after paying the expenses reported by him out of the purchase-money as received,

*and* dispose of the residue as directed by the acts of assembly in such cases made and provided.

I, E. H. Easby, clerk of the circuit court of Fayette county and State of West Virginia, do certify that the foregoing is a true copy from the records of my office; and I further certify that I have made dil*l*igent search throughout my said office and find no other than the above proceedings relating to the patent of Gallatin & Savary for 2,000 acres of land.

Given under my hand this 27th day of April, 1877.

E. H. EASBY, *Clerk.*

They also proved that a book containing some of the records
41 and proceedings of commissioners of delinquent and forfeited lands for the county of Fayette, in the State — Virginia, had been lost during the late war and could not be found.

The defendants also offered in evidence a copy of a deed made by Alfred Beckly, commissioner of forfeited & delinquent lands, to Mary Jones, in the words and figures following, to wit:

This indenture, made this fourth day of April, in the year of our Lord one thousand eight hundred and forty-three, between Alfred Beckly, commissioner of delinquent and forfeited lands in and for the county of Fayette and Commonwealth of Virginia, of the one part, and Mary Jones, of said county, of the other part: Whereas the circuit superior court of law and chancery for the said county of Fayette did, by virtue of an act of the General Assembly of Virginia passed on the 30th day of March, 1837, entitled An act to amend and explain the laws concerning western land titles and for other purposes, constitute and appoint the said Alfred Beckly commissioner of delinquent and forfeited land in and for the county of Fay-
42 ette. And whereas under the appointment aforesaid and in pursuance of the said recited act and of the amendatory act of the General Assembly passed on the 15th day of March, 1838, entitled "An act to amend an act entitled 'An act to amend and explain the laws concerning western land titles and for other purposes," the said Alfred Beckly, by virtue of an order of the judge of the circuit superior court of law and chancery for said county, made on the second day of April, 1842, did cause public notice to be given of the time and place of sale of the said land hereinafter described in a newspaper published nearest the place of sale, to wit, in the Western Whig, published in the tow- of Lewisburg on the county of Greenbrier, and caused the same to be posted at the door of the court-house of said county and at least four other public places in said county for at least thirty days next preceding the day of sale, and in pursuance of the said advertisement did offer at public sale at the door of the court-house aforesaid on the 16th day of June, 1842, among others the tract or parcel of land hereinafter described, and at the said public sale the said Mary Jones, the party of the second part, being the highest bidder, became the purchaser of part of a tract or parcel of land situate on
43 Armstrong creek, in said county, containing 2,000 acres, patented to Albert Gallatin and John De Valcoulon, *alias* John

Savary, on the 22d July, 1795, and forfeited in the name of their vendees, and which part of said tract is bounded as follows, to wit: Beginning at a beech on the bank of Armstrong's creek, about 80 poles above the mouth of the first large branch from the N. W.; thence N. 34° E. 280 poles to a division line agreed upon by the said Mary Jones and George Richards, and with said line from a walnut on the bank of the creek north 58° west to a certain point of a rock ledge on the top of the creek ridge, and with said ridge in all its meanders till it intersects the back or protracted line of the whole survey, and with said line south 49½ east to the beginning, containing four hundred acres, more or less, and the said sale having been confirmed by a decretal order made on the 1st day of September, 1842; and whereas the whole of the purchase-money having been paid by the said party of the second part the purchaser is now entitled, by the provision of the first-recited act, to a deed for the same from the said party of the first part, he, the said commis-
44 sioner, conveying such title therein as the said act authorises to be conveyed, or as he can convey as the authorised commissioner as aforesaid (but without any personal responsibility whatever): Now, this indenture witnesseth: That the said party of the first part, for and in consideration of $33.33, one-fourth whereof was to him in hand paid at the date of the sale aforesaid, and the residue, together with $—— interest accruing on said residue since the same became due, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part, her heirs and assigns forever, said part of said tract, to hold the same by and according to the metes, bounds, and abuttals above set forth, with all and singular the tenements, hereditaments, and appurtenances, and all the right, title, and interest that the said party of the first part is, under and by virtue of the acts aforesaid and under and by virtue of his appointment as aforesaid, authorized to convey on and to the same, to have and to hold the same, and all and singular the appurtenances aforesaid, to the said party of the second part,
45 her heirs and assigns forever.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

ALFRED BECKLEY, [SEAL.]
*Commissioner of Del. Forfeited Lands, Fayette Co.*

FAYETTE COUNTY COURT, CLERK'S OFFICE, *4th April*, 1843.

This deed was acknowledged by the vendor in this office, and is admitted to record.

Teste: JAMES T. WAITE, *D. C.*
For H. HILL, *C. F. C.*

A copy from the records in this office. Witness my hand & official seal this 18th day of September, 1874.

[L. S.] G. M. BLUME,
*Clerk County Court, Fayette County, West Virginia.*

To the reading of which deed the plaintiff objected because the said proceedings in Fayette county did not show Mary Jones to be the purchaser of the land described in said deed, and because the defendants produced no decree of court directing a deed to be made to her for the lands conveyed by said deed, which objections,
46 after being argued and considered, were each of them overruled by the court, and the said deed was read in evidence to the jury as connecting said Mary Jones with the said Gallatin grant and as showing title in the defendants, to which decisions and rulings, and to each of them, the plaintiff then and there excepted.

The defendants also read in evidence a copy of a deed from Alfred Beckley, commissioner to George Richards, in the words and figures following, to wit:

This indenture, made this twentieth day of January, in the year of our Lord one thousand eight hundred and forty-six, between Alfred Beckley, commissioner of delinquent and forfeited lands in and for the county of Fayette and Commonwealth of Virginia, of the one part, and George Richards, of Fayette county, Virginia, of the other part: Whereas the circuit superior court of law and chancery for the said county of Fayette did, by virtue of an act of the General Assembly of Virginia, passed on the 30th day of March, 1837, entitled "An act to amend and explain the laws concerning Western land titles and for other purposes," constitute and
47 appoint the said Alfred Beckley, commissioner of delinquent and forfeited lands in and for the county of Fayette;

And whereas, under the appointment aforesaid, and in pursuance of the said recited act, and of the amendatory act of the General Assembly, passed on the 15th day of March, 1838, entitled "An act to amend an act entitled 'An act to amend and explain the laws concerning Western land titles,' and for other purposes," the said Alfred Beckley, by virtue of an order of the judge of the circuit superior court of law and chancery for said county, made on the — day of April, 1842, did cause public notice to be given of the time and place of sale of the said land hereinafter described, in a newspaper published nearest the place of sale (to wit, in the —, published in the town of Charleston, in the county of Kanawha), and caused the same to be posted at the door of the court-house of said county, and at least four other public places in said county, for at least thirty days next preceding the day of sale, and in pursuance of the said advertisement did offer at public sale, at the door of the court-house aforesaid, on the 16th day of June, 1842, among others,
48 the tract or parcel of land hereinafter described, and at the said public sale the said George Richards, the party of the second part, being the highest bidder, became the purchaser of lot or tract No. 2, being part of a tract or parcel of land of 2,000 acres on Armstrong's creek, a branch of the Great Kanawha river, patented to Albert Gallatin and John DeVancoulen *alias* John Savary, on the 22d July, 1795, and forfeited in the name of John Savary, and which said tract or lot No. 2 is bounded as follows, to wit: Beginning at a walnut on the north bank of Armstrong's creek,

thence N. 56° west to a remarkably rocky place or pile on the dividing ridge between the waters of Armstrong's and Morris creeks; thence with said ridge, with its various bearings, to the closing or protracted line of the patent, and with it reversed N. 45½- west about 115 poles to division corner of part or lot No. 3, sold to James Morris, and with his line N. 33½° east 346 poles to the patent line, and with the same reversing south 57½° east 330 poles to lynn and birch; thence south 31° east 192 poles to Henry Bank's corner, and with a line of the original grant south 34° west about 45 poles to
49 the intersection of the line from walnut to the pile of rocks upon the dividing ridge.

And whereas, the whole of the purchase-money being paid by the said party of the second part, the purchaser is now entitled, by the provisions of the first-recited act, to a deed for the same from the said party of the first part for and in consideration of $30.66⅔, one-fourth whereof was to him in hand paid at the date of the sale aforesaid, and the residue (together with $—— interest accruing on said residue since the same became due) at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns forever, said lot or tract No. 2 to hold the same by and according to the metes, bounds, and abuttals above set forth, with all and singular the tenements, hereditaments, and appurtenances and all the right, title, and interest that the said party of the first own under and by virtue of the acts aforesaid and under and by virtue of his appointment as aforesaid authorized to convey in to the same, to have and to hold the same and all and
50 singular the appurtenances aforesaid to the said party of the second part, his heirs and assigns forever, subject to all the rights of occupant claimants according to the provisions of the several acts of assembly in such cases made and provided.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

ALFRED BECKLY, [SEAL.]
*Commissioner of Forfeited & Delinquent Lands, Fay Co.*

FAYETTE COUNTY COURT, CLERK'S OFFICE, *March 11th*, 1846.

Personally came before me in my office this day Alfred Beckly, commissioner of forfeited and delinquent lands in said county, party of the 1st part to the within indenture, and acknowledged the same to be his act & deed for the purposes therein expressed and desired the same to be recorded.

Teste: H. M. DICKINSON, *Clk.*

A copy.
Teste: M. T. DAVIS, *Clerk.*
by G. W. MILLER, *Dep.*

51 Defendants also read in evidence sundry deeds and decrees transferring and conveying to the defendants the title acquired by Mary Jones and George Richards by the said deeds from Beckley, commissioner to the lands described in the aforesaid deeds

to Jones and Richards respectively, and proved that said deed to the said Mary Jones embraced all the lands described in the plaintiffs' declaration which they have not disclaimed as aforesaid.

The defendants also introduced evidence tending to prove that they and those under whom they claim have been in the possession of the land conveyed in the said deed to Mary Jones since the date of its execution.

The plaintiff then further, to maintain the issue on his part, read in evidence sundry entries in the words and figures following, and endorsed "Thomas Edgar for Wm Wilson, three entries," to wit:

Thomas Edgar, for Wm. Wilson, enters 50,000 acres of land in Kanawha county by virtue of t-ree land office treasury warrants, 20,000 acres each, to begin joining a survey made for Henry Banks
52 of 10,000 acres on Cabbin creek and extend along back of Gallatins & Co., survey made on and near the Kanawha river, & all the surveys & entrys on the same as far up as the Montgomery line, & to extend back for quantity, leaving room for all surveys and prior locations in said bounds, warrants No. 783 & 782 & 784.

October 24, 1794.

Entry book No. 1, page 71st.

A copy.

Teste: JOEL S. QUARIN,
*Clerk Kanawha Co. C't.*

Thomas Edgar, for Wm. Wilson, lifts his entry of 10,000 acres, made between Skiles' entry of 40,000 acres & Banks' lands at the mouth of Gauley, & enters the same joining back of his entry of 50,000 acres between Cabbin creek & the Montgomery line along up Kanawha, made the 24th October, 1794, by virtue of part of L. office T. warrant for 20,000 acres, No 784, Jan'y 25th, 1795.

Entry book No. 1, page 86.

Teste: JOEL S. QUARIN,
*Cl'k Kana. Co. C't.*

Thomas Edgar, for William Wilson, lifts his entry of 10,000 acres made on 12 pole, the 24th Oct'r, 1704, & enters the same
53 joining his entry of 50,000 acres between Cabbin creek and the falls of Kanawha river.

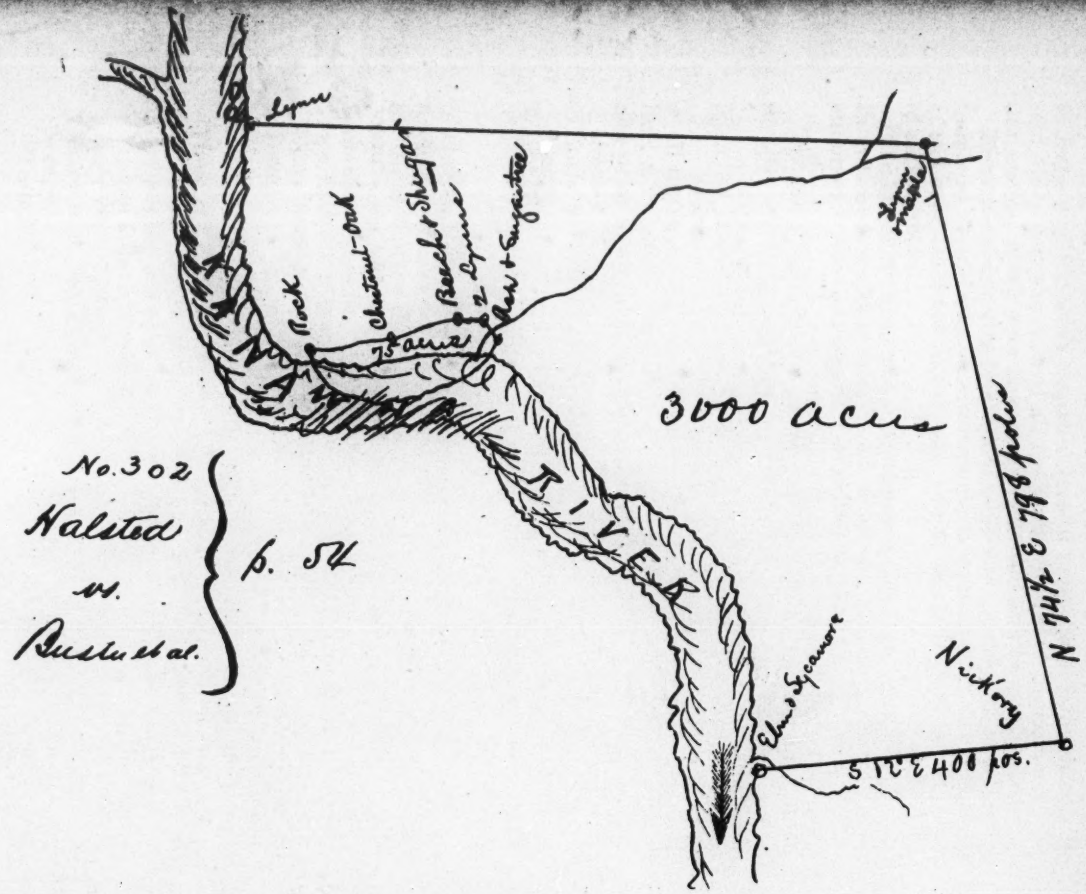
Jan'y 20th, 1795.

Entry book No. 1, page 84.

A copy.

Teste: JOEL S. QUARRIER,
*Cl'k Kanawha County C't.*

It was admitted also by the parties in open court, in the presence of the jury, that in addition to the foregoing entries Thomas Edgar, for William Wilson, on the 10th day of April, 1795, regularly entered 15,600 acres in Kanawha county, which entry added to the foregoing entries aggregates 85,600 acres (exclusive of 6,786 acres) on which the Martin grant is founded.




No. 302
Halsted
vs.
Burkett et al.

} b. SL

Also an entry dated the 12th day of April, 1785, in the words and figures following, to wit:

Albert Galiton & Savary De Valcoulon, among others, made the following entrys, to wit: For 100 acres, 1,900 acres, 5,000 acres, 4,000 acres, and also "8,000 acres on 3 State warrants, one No. 15240, dated 2d April, 1783, to Michael Ryan; one No. 21941 dated 24th Dec'r, 1783, & the other No. 15195, dated 2 Ap'l, 1783, granted to Philip Slaughter on the Gr-ate Kanawha, so as to include all the
54 vacant land on it, between the entry of Andrew Donnally at the Gr-ate Falls of the river and the several entrys made in Campbell's bottom & near it, little above and near Elk, leaving room for the entry made in the several places of that space, & also to extend back of the said entry of Donnally's one mile above it on the Kanaw-a the af's'd entry to be laid in as meny surveys as necessary to include all the vacant lands in the limits set by said location on the Gr-ate Kanawha.

Aprile 12th, 1785.

Copy.

Teste: THOMAS SWINBURN,
*Dep. for S. Chapman, S. K. C.*

Also a survey for 3,000 acres for Albert Gallatin and Savary De Valcoulon, dated 3d August, 1794, in the words and figures following, to wit:

(Here follows diagram marked p. 54.)

55 Surveyed for Albert Gallatin and Savary DeValcoulon 3,000 acres of land in Kanawha county on the S. W. side of the Great Kanawha river, joining around, above, and below a survey made for William Morris & Andrew Donally at the Great Falls of said river by virtue of a land-office treasury warrant for 500 acres, No. 21941, ass'e of James Hawkins, who was assignee of David Anderson, and is boundeth as followeth, to wit:

Beginning at a lynn opposite the mouth of Gauly river, on the bank of Kanawha, and also opposite two large rocks about 20 poles in the river, and thence down the river, with its meanders and binding therewith, three hundred and fifty-four poles to a large rock in the river, corner to Donnally & Morris, and with these lines S. 50 E. 78 poles to chestnut oaks, corner to the same; S. 15 E. 80 poles to a beech & sugar tree, corner to the same; south 50 poles to two lynns, corner to the same; S. 65 W. 48 poles to an ash & sugar tree on the bank of the river; thence down the river, with its meanders and binding thereon, seven hundred and seventy poles to a sycamore & elm on the bank of the river, joining or near the land surveyed for James Armstrong; thence leaving the river and
56 running S. 12° E. 400 poles to a hickory on a spur of a ridge; thence N. 74° E. 798 poles to a lynn and maple on the point of a hill in the fork of a creek, and about 15 poles from the main forks of said creek, which creek empties into Kanawha in the land

surveyed for Donnally & Morris; thence N. 1 W. 843 poles to the beginning.

3d Aug., 1794.

REUBEN SLAUGHTER, *S. K. C.*

Copy from record book 1, page 34.

A copy from the record.

Teste: HAMILTON MORRIS,
*Clerk Kanawha County Court.*

And proved that the Martin grant calls for the southern boundary of this 3,000-acre survey, and that said survey lies between the said Martin grant and the Great Kanawha river.

Also an entry dated the 12th day of April, 1783, in the words and figures following, to wit:

Albert Galiton & Savary DeValcoulon, among others, made the following entrys, to wit: For 100 acres, 1,900 acres, 5,000 acres, 4,000 acres, and "also 8,000 acres on 3 State warrants, one No. 15,240 dated 2d April, 1783, to Michael Ryan; one No.
57 21941, dated 24 Dec'r, 1783, & the other No. 15195, dated 2d Ap'l, 1783, granted to Philip Slaughter on the Gr-ate Kanawha, so as to include all the vacant land on it between the entry of Andrew Donnally at the Grate Falls of the river & the several entrys made in Campbell's bottom & near it, little above & near Elk, leaving room for the entrys made in the several places of that space, & also to extend back of the said said entrys of Donally's one mile above it on the Kanawha, the af's'd entry to be laid in as meny surveys as [are] necessary to include all the vacant lands in the limits set by said location on the Grate Kanawha.

Aprile 12th, 1783.

Copy.

Teste: THOMAS SWINBURN,
*Dep. for S. Chapman, S. K. C.*

Also 4,000 acres added to the foregoing entry on 3 land office warrants, one, No. 15466, dated 11th Ap'l, 1783, granted to John Lewis, & No. 17562 & 17566, & dated 30th June, 1783, granted to Richard Claiborne, so that the whole 12,000 be surveyed as the 8,000 had been directed by said entry.

Apr-le 12th, 1785.

Copy.

Teste: THOMAS SWINBURN,
*Dep. for S. Chapman, S. K. C.*

58 Also a survey for 2,000 acres for Albert Gallatin and Savary De Valcoulon, dated the 28 of August, 1794, in the words and figures following, to wit:

(Here follows diagram marked p. 58.)

Surveyed for Albert Gailatin & Savary De Valcoulon 2,000 acres

Black Oak
Area road access
Poplar
Poplar
No 302
Walnut
Ruckerthal
D.S.B.

of land in Kanawha county, on the S. west side of the Great Kanawha river, joining the lands of John Hansford, Wm. Prior, & Andrew Donnally, by virtue of a land office treasury warrant, for 2,000 acres, No. 15240, and dated 2d Ap'l, 1783, issued in the name of Michael Ryan, and is bounded as follows (to wit):

Beginning at a black oak corner to Hansford, and running with his line N. 57° W. 337 poles to a chestnut corner to same, & N. 56° E. 100 poles to a poplar & birch, on the bank of the river, thence down the river with its meanders 293 poles to a small lynn grown from a large stump on the bank of Kanawha river, thence leaving the river and with a line of William Prior's S. 35° W. 15 poles to a poplar corner, to the same S 78° W. 395 poles to a poplar, S. 47° W. 390 poles to a poplar corner to Donnally, and with his lines S. 40° W. 50 poles to a beech & sugar tree, S 35° E. 44 poles to a
59 black oak & white oak E. 92 poles to two beeches N. 77° E. 30 poles to two pines near the bank of Cabin creek; thence leaving Donnally's lines & running N. 82 E. 914 poles to the beginning.

28th Aug't, 1794.

REUBEN SLAUGHTER, *S. K. C.*

Copy:
Teste: THOMAS SWINBURN,
*Deputy for S. Chapman, S. K. C.*

And proved that this survey lies between the said Wilson survey for 85,600 acres and the Great Kanawha river, and that the southern boundary of the said 2,000 acres runs through the beginning corner of the said Wilson survey at the "2 beeches" designated by the index on said map No. 4.

The plaintiff also read in evidence two certificates, numbered 1 and 2, respectively, and proved the due payment of the taxes assessed on the lands granted to Benjamin Martin aforesaid up to and including the year 1842, which certificates are in the words and figures following, to wit:

(No. 1.)

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, VA, *April* 29, 1881.

60 I, R. A. Noel, first clerk in the office of the auditor of public accounts for the Commonwealth of Virginia, and, in the absence of said officer, acting auditor of public accounts, do hereby certify that it appears from the records of my office, which I have caused to be carefully examined, that on the 30th day of June, 1838, Judah Dobson paid into the treasury, through this office, the sum of $23.10 on account of the redemption of 85,600 acres of land on the Great Kanawha river, in Kanawha county, returned as delinquent for the taxes due thereon for the years 1835, 1836, & 1837.

Given under my hand the day and year above written.

R. A. NOEL,
*Act'g Auditor.*

(No. 2.)

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS,
RICHMOND, VA, *April* 29, 1881.

I, R. A. Noel, first clerk in the office of the auditor of public accounts for the Commonwealth of Virginia, and, in the absence of said officer, acting auditor of public accounts, do hereby certify that it appears from the records of said office, which I have caused to be carefully examined, that on the 19th July, 1836, John G. Mosby,
61 for H. O. Middleton paid into the treasury, through this office, the sum of $61.92, in redemption of a tract of 85,600 acres of land on Kanawha and New rivers, in the county of Fayette, in the name of Judah Dobson, which land was omitted from the books of the commissioner of the revenue for the years 1811 to 1835, both inclusive.

Given under my hand the day and year above written.

R. A. NOEL,
*Act'g Aud't'r.*

The plaintiff then read in evidence a survey made for Andrew Reed and John Stewart for 50,000 acres in the words and figures following, to wit:

Surveyed for Andrew Reid and John Stuart 50,000 acres of land by virtue of two entries, one *the* made the 4th day of day of August, 1794, for 25,629 acres on two land office treasury warrants for 19,471 acres, numbered 18199, granted to John Strother, Jun'r, the 30th day of July, 1783, and No. 14931, granted to Hannah Coon the 10th of Dec'r, 1782, and 6,158 acres, part of *a* land office treasury warrant No. 19830, granted to Obadiah Smith the 10th of Oct'r, 1783. The other entry, for 24,371 acres, made the 4th day of June, 1795, on *a* land office treasury warrant No. 1378, granted to Henry Banks the 19th of May, 1795, and 4,371 acres, part of *a* land office
62 treasury [warrant] No. 1057, granted to Joseph Meze the 3d of January, 1795, lying in Montgomery county, on the west side of New river "*alias*" Kanawha, including Loop creek, Arbuckle's creek and Pipe creek, and bounded as follows: Beginning at a white oak marked J. M., a chestnut and black oak on top of the river ridge below the mouth of Piney river and corner of Moore and Beckley's survey, and with their lines S. 80° W. 258 poles to two chestnut oaks; S. 30° W. 246 to a hickory and white oak sapling; S. 76° W. 94 to two white oaks; S. 10° E. 158 to two Spanish oaks and a chestnut; S. 50° W. 686 poles to a black oak and two white; N. 70° W. 46 to a black oak and chestnut; S. 75° W. 192 to two pines in a glade; N. 40° W. 114 to a white oak and oak marked J. M., and several other brazed trees; thence leaving Moore & Beckly's line north 450 poles to 2 chestnuts on a ridge; N. 40 W. 72 to two chestnuts and chestnut oak; N. 62 W. 64 to a white oak and two poplars; north 106 to a chestnut oak and chestnut; N. 45° W. 88 p. to 2 chestnuts and chestnut oak; N. 23 E. 36 to a chestnut and white oak on Stuart's ridge,

between the waters of the Loop and Paint creeks; N. 70° W.
63 100 to a chestnut oak, white oak, and small poplar; N. 18 E. 216 to two chestnut oaks on a ridge; N. 9° E. 298 to two chestnuts and small poplar on a ridge; N. 36 E. 40 to a black oak and chestnut; N. 102 to a chestnut, chestnut oak, and sour-wood saplin; N. 18 W. 242 to a black oak, gum tree, and chestnut on a ridge; N. 23° E. 52 to a black oak and white oak saplin; N. 30° W. 184, crossing a small fork of Paint creek, to two white oaks in a draft; N. 650 p. to a black and Spanish and a chestnut oaks on the point of a ridge; N. 39° E. 166 p. to two white oaks on a ridge; N. 58 to two Spanish oaks; N. 40 E. 68 to a Spanish and white oaks on a ridge; N. 17° W. 110 to a maple and chestnut oak; N. 18 E. 1,020 to a dogwood, a small poplar, and chestnut on a high ridge and along the same; N. 22° E. 116 to a black oak and red oak; N. 50° E. 40 to a black oak and white oak; N. 27° E. 190 to a black oak and three Spanish oaks; N. 41° W. 980 to two Spanish oaks marked J. E. and four chesnuts marked J. M., S. P., & W. R., on Farley's sugar tree mountain on the S. side of Pack's gap; N. 246 to 3 sugar trees on the side of a ridge; east 158 to three chestnut oaks on top of the mountain; N. 46° W. 74 to two sugar trees and a chestnut oak on said mountain; N. 30° E. 140 to two elms; N. 8° E. 144 to a
64 Spanish and chestnut oaks and sugar tree; N. 10° W. 132 to three chestnut oaks near a pinnacle of rocks; N. 70° E. 132 to 3 chestnut oaks; E. 52 to a lyn-and buckeye; N. 25° E. 1,040 to a white oak marked W. R. and chestnut marked J. S., J. M. and maple marked S. P. in a hollow; N. 40° E. 24 to a maple and Spanish oak on the river ridge; S. 242 to two white oaks and red oak marked J. S. near the bank of the river and up the several courses thereof, and binding thereon 5,220 poles, to a *sacefras*, two ash trees, and marked S. P., a Spanish oak and lynn on the river bank; thence continuing up and with the meanders of the river 1,056 poles to a beech; thence leaving the river S. 62° W. 186 to a sugar tree on the side of a ridge; S. 25° W. 40 to a poplar and hickory near the river; west 36 poles to a chestnut oak marked J. S. and chestnut oak saplin on the side of a ridge above a large deerlick; S. 28° W. 400 to an ash, sugar tree, and buckeye; S. 10° E. 30 to two ash trees and poplar near the river; S. 71° W. 16 to two water beeches and a sycamore on the edge of the river; N. 83° W. 240 up the river ridge to a poplar and Spanish oak; S. 62° W. 110 poles to the beginning. An allowance of 27.6624 acres is made in the calculation of the area of this plat*t* for three surveys, viz., two of 12,300 acres each and one of 3,062¼ acres,
65 made for Henry Banks and contained in the boundary thereof.

Compleated the 10th of June, 1795.

JOHN JAMESON &
THOS. FEANSTON,
*Chainmen.*

SAMUEL PACK &
JAMES ELLIS,
*Pilots and Marksmen.*

L. OFFICE.

A copy from the original.
Teste: JOHN MATHEWS, *Ass't.*
GORDON CLOYD, *S. M. C.*

Teste: W. SELDEN,
*Reg. L'd Off.*

January 31st, 1825.

The following is a copy of the map accompanying the last aforesaid survey, to wit:

(Here follows diagram marked p. 66.)

67 And proved that from 1,500 to 2,000 acres of this survey lies within the Martin grant on the southeast end thereof.

Also an entry made for Thomas Edgar, 4th March, 1795, in the words and figures following, to wit:

1795, March 4. Surveyed by W. D.

Thomas Edgar, by virtue of 2 land office treasury warrants, one No. 693, granted to Alex'r Porter and James Welch the 9th of Sept., 1794, 5,000 acres of which is unappropriated, the other, No. 15,902, a duplicate, granted to Colo. Wm. McWilliams, & the property of Henry Banks, and by him assigned to Thos. Edgar, for 4,000 acres, and a certificate for 730 acres lodged in the surveyor's office of Greenbrier, No. 469, dated 29th of May, 1794, granted to Henry Bowyer, in all amounting to 9,730 acres, enters the same below and adjoining Colo. John Stuart's and Andrew Reid's entry of 31,356½ acres.

The above is a true copy of the entry made by Thomas Edgar of 9,730 acres in entry book D, page 28, in the surveyor's office in Montgomery county, Va.

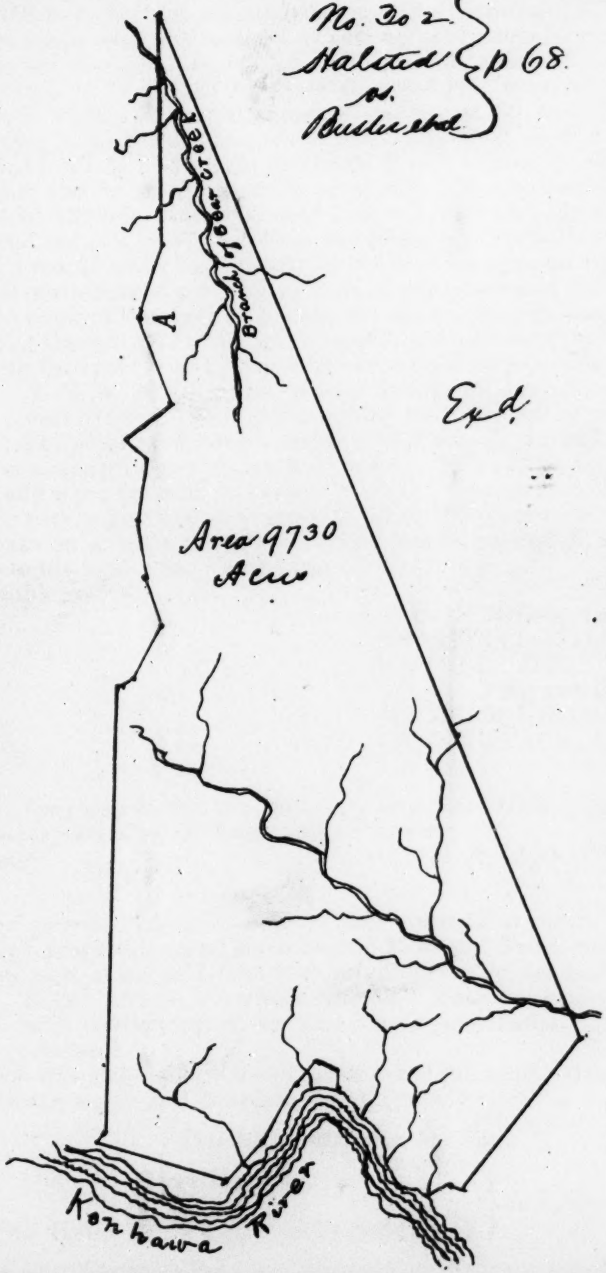
Teste: R. R. LINKONS,
*Su. M. Co., Va.*

68 Also a copy of a survey made for Thomas Edgar for 9,730 acres, in the words and figures following, to wit:

(Here follows diagram marked p. 68.)

Surveyed for Thomas Edgar 9,730 acres of land by virtue of an entry made 4th of March, 1795, on the following land office treasury warrants, "viz:" 5,000 acres, part of a land office treasury warrant No. 693, granted to Alexander Porter & James Welch the 9th of September, 1794; 4,000 acres on a land office treasury warrant No. 15902, granted to Colo. William McWilliams the 8th of May, 1783, and 730 acres, part of a land office treasury warrant No. 469, granted to Henry Bowyer the 29th of May, 1794, lying in Montgomery county, on the Kenhawa river, a small distance above the falls, and bounded as follows: Beginning at two Spanish oaks marked I. E. and four chestnuts marked I. M. S. P. & W. R. on Farly's sugar-tree mountain, on the south side of Pack's gap, and corner of Ried's
69 and Stuart's loop survey, and joining and below Andrew Reid's entry of 31,356 acres, and thence with the lines of the

No. 302
Halsted
vs.
Buchanan
p 68.



loop survey N. 246 poles to three sugar trees on the side of a ridge, east 158 to 3 chestnut oaks on the top of the mountain, N. 46 W. 74 to two sugar trees and a chestnut oak on said mountain, N. 30° E. 140 to two elms, N. 8 E. 144 to a Spanish & chestnut oaks and a sugar tree, N. 10 W. 130 to three chestnut oaks near a pin-acle of rocks, N. 70 E. 132 to three chestnut oaks, east 52 to a lynn and buckeye, N. 25 E. 1040 to a white oak marked W. R. and chestnut marked I. S. I. M. and maple marked S. P. in a hollow, N. 50 E. 24 to a maple and Spanish oak on the river ridge; thence leaving s'd line N. 33 W. 132 to a white oak and red oak, S. 66 W. 116 to a white oak and red oak, S. 47 W. 120 to two hickories in a hollow, S. 76 W. 96 to a maple and a large poplar, N. 46 W. 58 to a poplar and maple on the north side of a hill, N. 3 E. 54 to a chestnut and chestnut oak on the bank of the river and down the several courses thereof and binding thereon, 342 poles to two maples and a chestnut oak; thence leaving the river W. 54 poles to two chestnuts on west side of a hill, N. 55 W. 30 to two beech trees by a small branch, south 67°
70 west 470 to a beech and chestnut on the bank of a creek, S. 318 poles to a double sugar tree, lynn, maple, and chestnut oak on a sharp ridge by a stack of rocks, S. 7° W. 2,320 to two white oaks and a poplar near a branch of Bear creek and on a line of Reed's survey and with the same N. 41 E. 486 poles to three chestnut oaks on a high ridge, a corner of Reed's survey, N. 52 E. 232 poles to the beginning; variation, 3° E.

Completed 20th April, 1796.

WM. DINGESS, *Ass't.*
GORDON CLOYD, *S. M.C.*
SAMUEL PACK,
*Pilot and Director.*
WILLIAM HILTON &
SAMUEL PACK, JR.,
*Chainmen.*

The foregoing survey is a true copy from land book, page 231, in the surveyor's office of Montgomery Co., Va.

Teste: B. R. LINKONS,
*Suv'r M. Co., Va.*

And proved that 6,817 acres of this survey lies within the said Martin's grant, adjoining the aforesaid Ried and Stuart survey, and that no part of the said Ried and Stuart survey, or the said Thomas Edgar survey, lies within the said interlock caused by the
71 said overlapping of the said Martin and Gallatin grants as aforesaid.

Upon this state of facts the plaintiff asked the court to instruct the jury in the words and figures as follows, to wit:

*Plaintiff's Instruction No.* 1.

JOHN HALSTEAD
*vs.*
THE HEIRS OF WILLIAM B. BUSTER, Dec'd. } In Ejectment.

The court instructs the jury, inasmuch as it is a conceded fact in

this cause that the Gallatin survey of 2,000 acres, which has been given in evidence by the defendants, and under which they claim was, at the date of the passage of the act of March 22d, 1842, concerning delinquent and forfeited lands, forfeited to the Commonwealth for the non-payment of taxes due thereon or for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law, that the said survey then was, by reason of such forfeiture, vested in the Commonwealth, and if the jury find from the evidence that the boundaries of the William *William* survey of 85,600 acres and the grant thereunder given in evidence by the plaintiff and under which he claims included ~~any~~ part of the land embraced within the boundary of the said forfeited
72 survey, and that the persons having just title or claim to said Wilson survey at the passage of the act aforesaid shall have paid all the taxes duly assessed and charged against them, and all taxes that ought to have been assessed or charged thereon from the time they acquired title thereto, then by virtue of the said act of March 22d, 1842, that portion of the forfeited survey embraced within the boundary of the Wilson survey, which had become and was vested in the Commonwealth, became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons under *bona fide* claim to any part of said land by title, legal or equitable, derived from the Commonwealth and on which the taxes had been fully paid up according to law; to the giving of which instruction the defendants objected, and in lieu thereof the court, at the instance of defendants, instructed the jury as follows, to wit: If the jury find from the evidence that the grant to Gallatin & Savary, under which defendants claim, is older than the grant to Benjamin Martin, assignee of William Wilson, under which the plaintiff
73 claims, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that every portion of the land in controversy is included within the calls of each of said grants, then the court instructs the jury that that portion of the Gallatin & Savary survey within the said Martin survey was excepted and reserved in and from the operation of the Martin grant, and that the grant to said Martin, assignee, &c., vested in him no title or claim of title to so much of the Gallatin & Savary grant as was included within the limits of *of* the said Martin grant, and that the plaintiff has acquired no title or claim of title to the land in controversy in this suit by virtue of the forfeiture of the Gallatin and Savary title to the Commonwealth of Virginia.

To the giving of which instruction the plaintiff objected; and the said objections of the defendants and plaintiffs, respectively, being argued and considered, the court was of the opinion to and did accordingly sustain the defendants' objections to the plaintiff's aforesaid instruction, and did overrule plaintiff's said objections to the defendants' said instructions; and thereupon the court refused to

instruct the jury as requested by the plaintiff, but did instruct
74 the jury as requested by the defendants.

To which foregoing decisions, rulings, and actions, and to each of them, the plaintiff then and there excepted, and his said exceptions are signed, sealed, and reserved to him.

May, 1883. J. J. JACKSON.

Bill of exceptions marked No. 2 is in the words and figures following, to wit:

*Bill of Exceptions No. 2.*

Be it remembered that on the trial of this cause the plaintiffs moved the court to set aside the verdict of the jury, and to award him a new trial therein, upon the ground that the verdict is contrary to the evidence, and that the court misdirected the jury upon the law of the case; and the court, after considering the motion upon the evidence taken in the cause, the papers filed, and instructions given and refused, as set out in the bill of exceptions marked number one in this cause, is of the opinion to overrule said motions, and thereupon the court refuses to set aside said verdict; to which decisions, rulings, and actions of the court the plaintiff doth except, which exceptions *is* signed, sealed, and reserved to him; which is done.

J. J. JACKSON.

75 And now at this day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston on the 30th day of May, 1883, being the same day and year first herein mentioned:

The plaintiff desiring to appeal from the judgment of the court rendered in this cause to the Supreme Court of the United States, and it appearing from affidavits filed in this cause that the land in controversy exceeds in value the sum of $5,000, the court certifies that the matter in controversy in this cause, exclusive of costs, exceeds the sum of $5,000. A writ of error and supersedeas is allowed the plaintiff on his executing a bond with good security in the penalty of $2,000, conditioned according to law, to be approved by a judge of a circuit or district court of the United States, and filing the same in the clerk's office of this court at Charleston.

Execution is stayed on said judgment for 60 days.

The following is a copy of the appeal bond given in pursuance of the last foregoing order and filed in the clerk's office of this court at Charleston on the 29th day of June, 1883.

*Appeal Bond.*

76 Know all men by these presents that we, John Halstead and John J. Blauvelt, are held and firmly unto Mary A. Buster, Sarah A. Buster, heirs-at-law of Wm. B. Buster, and Eldridge Barrett, in the just and full sum of two thousand (2,000) dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly,

by these presents. Sealed with our seals and dated this 26th day of June, 1883.

The condition of the above obligation is such that whereas the above-named John Halstead has prosecuted an appeal to the Supreme Court of the United States to reverse a judgment of the district court of the United States for the district of West Virginia, holden at Charleston, rendered by the Honorable John J. Jackson, judge of the said court, in an action of ejectment pending in said court, in which the said John Halstead is plaintiff, and Mary A. Buster, Sarah A. Buster, heirs-at-law of William B. Buster, and Eldridge Barrett are defendants:

Now, therefore, if the said John Halstead, the plaintiff in said action, shall prosecute the said appeal to effect and answer
77 all costs and damages if he should fail to make good his plea, then this obligation to be void; else, to remain in full force.

JOHN HALSTEAD. [SEAL.]
JOHN J. BLAUVELT. [SEAL.]

Acknowledged before me—

[Seal Sam'l H. Lyman, U. S. Commissioner, So. Dist. New York.]

SAMUEL H. LYMAN,
*U. S. Com'r & Clerk U. S. Dist. Court,*
*South'n Dist. New York.*

(Endorsed:) Approved June 26, 1883. Addison Burns, U. S. dist. judge, so. dist. of N. Y.

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do certify that the foregoing is a true and correct transcript of the record and proceedings in the action of ejectment lately pending in my said court at Charleston, wherein John Halstead was plaintiff, and Sarah A. Buster & others were defendants, except an entry mentioned on page 33 of this record as not found in the papers.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my said court at Charleston, this 13th day of September, A. D. 1883.

[Seal District Court United States, District West Virginia, Charleston, West Va.]

JASPER Y. MOORE,
*Clerk D. C. U. S., D. W. Va.*

Fee for this record, $44.75.

78 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable the judge of the district court of the United States for the district of West Virginia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said district court before you at Charleston, between John Halsted and Sarah A. Buster and Mary A. McGee (late Mary A. Buster), a manifest error hath happened, to

the great damage of the said John Halsted, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be there and then
79 held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 5th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal District Court United States, District West Virginia, Charleston, West Va.]

Teste: JASPER Y. MOORE,
*Clerk Dist C't U. S., Dist. West Va.*

Copy of above writ filed in the clerk's office, dist. c't U. S. at Charleston, in said cause, June 5th, 1883.

Teste: JASPER Y. MOORE,
*Clerk D. C. U. S., D. W. V.*

80 [Endorsed:] John Halsted *vs.* H's of W. B. Buster. Writ of error.

81 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Sarah A. Buster and Mary A. McGee (late Mary A. Buster):

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, wherein John Halsted is plaintiff in error, and you are defendants in error, to shew cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, judge of the said district court, this 25th day of August, A. D. 1883.

J. J. JACKSON, *Judge.*

82 [Endorsed:] Service accepted for Sarah A. Buster & Mary A. McGee by Thos. L. Brown, their atty, Sept. 13, '83.

83 UNITED STATES OF AMERICA, } 88:
*District of West Virginia,* }

To the honorable justices of the Supreme Court of the United States:

And now comes John Halstead, by William H. Hogeman, his attorney, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between John Halstead, plaintiff, and Sarah A. Buster and Mary A. McGee (formerly Mary A. Buster), heirs-at-law of Wm. B. Buster, deceased, defendants, tried in the district court of the United States for the district of West Virginia, and exercising circuit court powers, at the May term, 1883, and in which judgment was rendered against him on the 30th day of May, 1883, manifest error hath intervened to the great damage of the said John Halstead, in this:

1st. It was error to refuse to instruct the jury as requested by the plaintiff.

2d. It was error to instruct the jury as requested by the defendant.

3d. It was error to overrule plaintiff's motion to set aside the verdict of the jury; and

4th. It was error to enter judgment on said verdict.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

WM. H. HOGEMAN,
*Attorney for Plaintiff in Error.*

[Endorsed:] D. C. U. S. D. W. Va. Halstead, in ejectment, *vs.* Buster. Record.

Endorsed on cover: West Virginia D. C. U. S. No. 302. John Halsted, plaintiff in error, *vs.* Sarah A. Buster and Mary A. McGee (late Mary A. Buster). Filed 25th September, 1883.

83 UNITED STATES OF AMERICA, }
*District of West Virginia*, } *ss:*

To the honorable justices of the Supreme Court of the United States:

And now comes John Halstead, by William H. Hogeman, his attorney, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between John Halstead, plaintiff, and Sarah A. Buster and Mary A. McGee (formerly Mary A. Buster), heirs-at-law of Wm. B. Buster, deceased, defendants, tried in the district court of the United States for the district of West Virginia, and exercising circuit court powers, at the May term, 1883, and in which judgment was rendered against him on the 30th day of May, 1883, manifest error hath intervened to the great damage of the said John Halstead, in this:

1st. It was error to refuse to instruct the jury as requested by the plaintiff.

2d. It was error to instruct the jury as requested by the defendant.

3d. It was error to overrule plaintiff's motion to set aside the verdict of the jury; and

4th. It was error to enter judgment on said verdict.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

WM. H. HOGEMAN,
*Attorney for Plaintiff in Error.*

[Endorsed:] D. C. U. S. D. W. Va. Halstead, in ejectment, *vs.* Buster. Record.

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CLERK

# SUPREME COURT

—OF THE—

# UNITED STATES.

JOHN HALSTED
*vs.*
SARAH A. BUSTER ET AL.,

IN EJECTMENT.

## BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

# SUPREME COURT OF THE UNITED STATES.

JOHN HALSTED
*vs.*
SARAH A. BUSTER, ET AL., } IN EJECTMENT.

*To the Honorable Judges of the Supreme Court:*

I submit the following brief and points as attorney for plaintiff in error in this action:

On the first Monday in August, 1873, John Halsted, a citizen of the State of New York, brought an action of ejectment in the District Court of the United States, for the District of West Virginia, against William B. Buster and Eldridge Barrett, to recover certain tracts of land situate in Kanawha County in said District. One of the tracts is described by courses and distances supposed to contain two thousand acres; and the other tract is described as containing about one hundred acres. The defendants disclaimed title to all of the land described in the plaintiff's declaration, except the parcel described on the plat marked "X," beginning at point marked "B," thence with the blue line to the

point "D," thence with the red line to point "J" on the outer line of the Gallatin survey of 2,000 acres, thence to point "P," thence with the red line to the point "C," thence by the blue line to the place of beginning at "B;" and as to this, issue was joined on the plea of not guilty.

William B. Buster died shortly after the action was brought, and by consent of parties, the action was revived in the name of Mary A. Buster and Sarah A. Buster, heirs at law, &c., and the action was dismissed as to Eldridge Barrett.

On the 8th day of May, 1882, the action was submitted to a jury, which resulted in a verdict for the defendants, on the 10th day of May, 1882. The court, on the 30th day of May, 1883, gave judgment for the defendants on the verdict of the jury.

On the trial, the plaintiff and defendants each requested an instruction to the jury, and the court refused the instruction asked for by the plaintiff, and gave to the jury the instruction asked for by the defendants, and the plaintiff excepted, &c.

The plaintiff's title rests on a survey made for William Wilson, on the 14th of April, 1795, for 85,600 acres, followed by a patent to Benjamin Martin, assignee of William Wilson, dated January 1st, 1796, for the tract described in the survey.

The survey to William Wilson concludes with the following reservation, to-wit: "including 6,786 acres of prior claims, for which there is an allowance made in the calculation." (Page 7.)

And the grant to Benjamin Martin concludes as follows: "But it is always to be understood that the survey upon which this grant is founded includes 6,786 acres of prior claims (exclusive of the above quantity of 85,600 acres), which, having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants, and this grant shall be no bar, in law or equity, to the confirmation of the title or titles to the same, as before mentioned and reserved," &c. * * "to have and to hold," &c., "except as before excepted," &c.; which reser-

vation corresponds with the reservation made in the survey, and is known as an " inclusive survey."

Surveys having been made in different parts of the State subsequent to the treaty of 1783, which included in their boundaries smaller tracts, and these being reserved by the surveyor, some doubts arose as to the authority of the Governor to grant patents in such cases. Accordingly, on the 2d day of June, 1788, the Legislature of Virginia passed an act to authorize the Governor to issue them, the 1st section of which is as follows:

"That it shall and may be lawful for the Governor to issue grants with reservation of claims to lands included within such surveys, anything in any law to the contrary notwithstanding."

The reservation is founded on the certificate of the surveyor, and with the exception of the land reserved, the grantee procured a legal title for the lands embraced within the exterior lines of his survey.

The "prior claims" reserved may be specific, so as to leave no doubt as to the particular number of acres or boundary reserved; or they may be for a certain number of acres, the identification and location of which may become a question of fact for the jury to decide.

The Gallatin and Savary grant of 2,000 acres, under which the defendants claim, which forms an interlock with the Martin grant, is founded on an older entry and survey than the entries and surveys on which the Martin grant is founded; but the Gallatin and Savary grant became forfeited to the Commonwealth of Virginia, on or before the 22d day of March, 1842, for " the non-payment of taxes due thereon," and for " the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties, and have the same charged with taxes according to law;" and by this forfeiture, the Gallatin and Savary grant, to the extent of that part which lies within the Martin grant, enured to the benefit of the owners of the Martin grant, for the reason that the owners of said last mentioned grant had complied with all the conditions necessary to procure the

benefit of such forfeiture, which were: 'first, just title or claim derived from the Commonwealth, previous to January 1st, 1843; and, second, the payment of all taxes up to and including the year 1842, in accordance with section 3 of the act of the Legislature of Virginia, passed March 22d, 1842, which runs as follows:

"That all right, title and interest which shall be vested in the Commonwealth in any lands lying west of the Alleghany Mountains, by reason of the non-payment of taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioners of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted in reference to delinquent and omitted lands, shall be, and the same are hereby absolutely transferred to, and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs and devisees,) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held, or derived from or under any grant of the Commonwealth, bearing date previous to the first day of January, eighteen hundred and forty-three, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable."

If the patent to Gallatin and Savary for the 2,000 acres is not within the *exception*, which was a question for the jury, then the Martin grant secures to the grantee the same title to the land that a junior patent located on an elder patent would secure.

It is a title well known in Virginia and West Virginia, and where these elder grants have been forfeited for non-payment of taxes and non-entry, the law casts the forfeited title on the junior grant absolutely and completely, without inquisition or judicial proceeding of any kind.

(Wild's Lessee vs. Serpell, 10 Grattan, 405.)

The law does not undertake to prescribe the character of evidence necessary to prove and locate the "prior claims" in an inclusive grant, and the plaintiff proved by the best adducible evidence, that the defendants are occupying lands

granted to Benjamin Martin, on which his (plaintiff's) claim rests. He has located his land, and has located 8,000 acres of "prior claims" to the Martin survey and entries, within the Martin grant, and outside of the Gallatin and Savary grant.

The plaintiff therefore asked the court to charge the jury, first:

"Inasmuch as it is a conceded fact in this cause that the Gallatin survey of 2,000 acres, which has been given in evidence by the defendants and under which they claim, was, at the date of the passage of the act of March 22d, 1842, concerning delinquent and forfeited lands, forfeited to the Commonwealth for the non payment of taxes due thereon, or for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law, that the said survey then was, by reason of such forfeiture, vested in the Commonwealth, and if the jury find from the evidence that the boundaries of the William Wilson survey of 85,600 acres and the grant thereunder given in evidence by the plaintiff and under which he claims included any part of the land
72 embraced within the boundary of the said forfeited survey, and that the persons having just title or claim to said Wilson survey at the passage of the act aforesaid shall have paid all the taxes dully assessed and charged against them, and all taxes that ought to have been assessed or charged thereon from the time they acquired title thereto, then by virtue of the said act of March 22d, 1842, that portion of the forfeited survey embraced within the boundary of the Wilson survey, which had become and was vested in the Commonwealth, became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons under *bona fide* claim to any part of said land by title, legal or equitable, derived from the Commonwealth and on which the taxes had been fully paid up according to law."

To the giving of which instruction the defendants objected, and in lieu thereof the court, at the instance of the defendants, instructed the jury as follows, to-wit:

"If the jury find from the evidence that the grant to Gallatin and Savary, under which defendants claim, is older than the grant to Benjamin Martin, assignee of William Wilson, under which
73 the plaintiff claims, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that every portion of the land in controversy is included within the calls of

each of said grants, then the court instructs the jury that that portion of the Gallatin and Savary survey within the said Martin survey was excepted and reserved in and from the operation of the Martin grant, and that the grant to said Martin, assignee, &c., vested in him no title or claim of title to so much of the Gallatin and Savary grant as was included within the limits of *of* the said Martin grant, and that the plaintiff has acquired no title or claim of title to the land in controversy in this suit by virtue of the forfeiture of the Gallatin and Savary title to the Commonwealth of Virginia."

The plaintiff excepted to the ruling of the court, refusing to give the instruction asked for by him, and in giving the instruction given, which are the principal errors complained of.

It was error to refuse the instruction asked for by plaintiff; it was also error to give the instruction asked for by the defendants.

If the question of locating the excepted lands was not a question of *fact*, the burden of proof was on the defendants, who claimed under the Gallatin patent, to prove that the land in controversy was excepted land.

(Hopkins vs. Ward, 6 Mumford, 40.)

The defendants' title to the land in controversy, rests on a deed from Alfred Beckley, commissioner of delinquent and forfeited lands, to Mary Jones, under proceedings to sell the Gallatin and Savary grant, as forfeited land, in Fayette county, Virginia; and by this deed they undertake to connect their title to the Gallatin grant. The objections taken by the plaintiff to the reading of the deed in evidence, the decision of the court and the exceptions taken by plaintiff, are set out in the bill of exceptions, (page 18,) as follows:

"To the reading of which deed the plaintiff objected because the said proceedings in Fayette county did not show Mary Jones to be the purchaser of the land described in said deed, and because the defendants produced no decree of court directing the deed to be made to her for the lands conveyed by said deed, which objections, after being argued and considered, were each of them overruled by the court, and the said deed was read in evidence to the

jury as connecting the said Mary Jones with the Gallatin grant, and as showing title in the defendants, to which decision and rulings, and to each of them; the plaintiff then and there excepted."

There is error, also, in this instruction, for the reasons stated therein.

The instructions asked for by plaintiff and defendants are founded on evidence, substantially as follows:

The plaintiff, to maintain the issue on his part, put in evidence with other evidence, admissions, agreements and evidence referred to in his bill of exceptions "No. 1," as follows:

Plat and survey for William Wilson for 85,600 acres of land, made April 14, 1795.

Grant from the Commonwealth of Virginia to Benjamin Martin, assignee of William Wilson, for 85,600 acres of land, dated 1st January, 1796.

By sundry deeds and wills, all the title acquired by Martin under said grant, and all that enured to it by the forfeiture of the Gallatin and Savary title for 2,000 acres, granted to them by the Commonwealth of Virginia, 22d July, 1795, to the extent of the land described in the plaintiff's declaration, became vested in the plaintiff before, and was owned by him at the time this action was brought.

And it was agreed that the Gallatin and Savary title to the 2,000 acres referred to, was, on or before the 22d day of March, 1842, forfeited to the State for the non-payment of taxes, &c. (Page 15.)

A survey for 3,000 acres for Albert Gallatin and Savary, dated 3d August, 1794, situate on south-west side of Great Kanawha river, joining around, above and below a survey made for Morris and Donnally at the Great Kanawha Falls of said river—beginning at a "Lynn" opposite mouth of Gauley river, &c., on the Kanawha river, and running to a "Hickory," &c., and to a "Lynn," &c. (Page 21.)

And proved that the Martin grant calls for the southern boundary of this 3,000-acre survey.

A survey for 2,000 acres for Albert Gallatin and Savary, dated 28th August, 1794, situate on south-west side of the Great Kanawha river. (Page 22.)

And proved that this survey lies between the Martin grant and the Great Kanawha river, and that the southern boundary of this 2,000-acre survey runs through the beginning corner of said Martin grant at the "2 beeches" designated on the index map "No. 4."

A survey made for Andrew Reed and John Stewart, for 50,000 acres, completed 10th June, 1795, on an entry made 4th August, 1794. (Page 25.)

And proved that 1,500 or 2,000 acres of this survey lies within the Martin grant, on the south-east end thereof. (Page 26.)

An entry made for Thomas Edgar, *4th March*, 1795, for 9,730 acres of land, lying below and adjoining the entry made for John Stewart and Andrew Reed.

Copy of survey made for Thomas Edgar, for 9,730 acres, completed April 20th, 1796. (Page 26.)

And proved that 6,817 acres of this survey lies within the Martin grant, adjoining said Reed and Stewart survey, and that no part of said Reed and Stewart or Thomas Edgar surveys lies within the interlock caused by the overlapping of the Martin grant and the Gallatin and Savary grant of 2,000 acres laid down on said map "No. 4." (Page 27.)

And plaintiff introduced evidence tending to prove that he and those under whom he claims, had been in occupation of the land described in the declaration, by actual occupancy, since 1860, and proved due payment of the taxes assessed on the lands granted to Martin up to and including the year 1842. (Page 23.)

And the defendants, to maintain the issue on their part, read in evidence a copy of the survey for 2,000 acres, herein referred to, made 24th August, 1794. (Page 13.)

Also, a copy of a grant from the State of Virginia to

Albert Gallatin and Savary, for 2,000 acres, dated 22d July, 1795.

The defendants also read in evidence copies of proceedings covering the forfeiture of the Gallatin and Savary 2,000 acres in controversy. (Page 15.)

Also, a deed from Beckley, commissioner of delinquent and forfeited lands, to Mary Jones, dated 4th April, 1843.

To the reading of which deed the plaintiff objected, which objection was overruled, and exception taken by the plaintiff.

Also, a deed from Beckley, commissioner, to George Richards, dated 20th January, 1846.

And the defendants read in evidence sundry deeds and decrees, transferring and conveying to the defendants the title acquired by Mary Jones and George Richards, by the deeds from Beckley, commissioner, to the lands described in the two deeds last mentioned.

And it was admitted by the parties that the Wilson survey of 85,600 acres and the Gallatin and Savary survey of 2,000 acres, made 24th August, 1794, (under which defendants claim,) are correctly laid down on the plat made by A. P. Sinnett, marked "No. 4," and form an interlock, as there reported. (Page 12.)

It was also admitted, &c., that the lands claimed by the plaintiff, and described in his declaration, are represented and inscribed on said map within the lines shaded blue, as the "Forest Hill Tract," and that said lands are correctly laid down on said map. (Pages 9. 12, 13.)

It was also proved that the beginning corner in the Martin grant, for 85,600 acres, is described on said map by the index pointing to the corner marked "2 beeches."

That the fourth call in said grant, for "two chestnut trees growing from one root," is represented on the Martin line, within the Gallatin and Savary grant, at "2 chestnuts," which were found and located. And that the call in the Martin grant, "to a beech in the Forks of Armstrong's Creek," corner

to Albert Gallatin's survey of 2,000 acres, is represented on said map at the point "A."

The foregoing are the substantial points of the evidence on which the instructions are founded.

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The survey of 2,000 acres for Gallatin and Savary, made 28th August, 1794, and put in evidence by plaintiff, lies between the Wilson survey and the Kanawha river, and the southern boundary runs through the beginning corner of the Wilson survey at "2 beeches." (Page 23.)

See map of the Wilson survey.

The first call for a Gallatin survey in the Wilson survey, after leaving beginning corner, is for a "beech" in the Forks of Armstrong's creek, "corner to Albert Gallatin survey of 2,000 acres," which survey interlaps with the Wilson survey, and with the exception of the part which interlaps, it lies between the Wilson survey and the Kanawha river.

The survey for the 3,000 acres for Albert Gallatin and Savary, &c., dated 3d August, 1794, lies above the 2,000-acre survey above mentioned, and between the Kanawha river and the Wilson survey, and the Wilson survey calls for the Gallatin survey at a "hickory," and runs with the Gallatin line to a "gum and maple," thence to "2 Spanish oaks." (See map and survey of Wilson survey, and map and survey of the 3,000 acres, on page 21.)

So it will be observed that with the exception of the inter lock referred to, there is almost a coterminous line of Gallatin and Savary surveys lying between the Wilson survey and the Kanawha river, from the lower beginning corner at "2 beeches," to the upper corner of the Wilson survey above the Kanawha Falls, opposite Gauley river.

Attention is called to the *general* description of the Wilson survey, as follows: "Eighty-five thousand, six hundred acres of land in Kanawha county, on south-west side of Great

Kanawha river, joining surveys made for Albert Gallatin & Co., at and near the Great Kanawha Falls of said river, *extending down, back of, and with said surveys*," &c.

The same language is used in the grant to Martin, assignee of Wilson, in the *general* description of the Wilson survey, as above quoted. (Page 8.)

This evidence, I think, is sufficient to carry conviction that the allowance made by the surveyor of the Wilson survey of "6,786 acres of prior claims, for which there is an allowance made in the calculation," is no part of the Gallatin and Savary grant for the 2,000 acres involved in this action, and that the interlock between the Wilson survey and the Gallatin and Savary survey was an accident.

The Reed and Stewart survey, for 50,000 acres, was based on an entry made on the *4th of August*, 1794. The survey made for William Wilson, for 85,600 acres, was made on the 14th of April, 1795, and the last entry on which the Wilson survey was based was made on the 10th of April, 1795. (Page 20.)

The survey for Thomas Edgar, for 9,730 acres, was made on an entry made the *4th of March*, 1795.

So that when the last entry on which the Wilson survey was made was entered, and when the said survey was made, the Reed and Stewart and Thomas Edgar surveys were "prior claims" and inchoate titles.

(Armstrong and Morrell, 11 Wallace, page 120.)

(Bryan and Willard, 21 West Virginia, page 65.)

And the plaintiff fully accounted for the 6,786 acres reserved and excepted from the calculation in the Martin grant by proof, showing that about 8,000 acres of "prior claims" (inchoate titles,) of the Reed and Stewart and Thomas Edgar surveys, lie within the Martin grant, on the north end thereof, which fact was not proven in the case of Bryan vs. Willard.

No part of the Reed and Stewart and Thomas Edgar surveys lies within the Gallatin and Savary grant.

The defendant's title to the land involved in this action,

was derived from the commissioner of delinquent and forfeited lands, under sales of said 2,000 acres, made under an order of the Circuit Superior Court of Law and Chancery for Fayette county, on April 2d, 1842. The sale was made June 16th, 1842, and the deed was made to those under whom defendants claim on April 4th, 1843.

The plaintiff claims that when the Gallatin and Savary survey of 2,000 acres was forfeited, the forfeiture enured, to the extent of the interlock, to the owners of the Martin grant, for the reason that the owners of the Martin grant had proved the existence of every prerequisite prescribed in section 3, of chapter 13, of the Acts of 1842, necessary to entitle him to the forfeited title.

The prerequisites were: first, just title derived from the Commonwealth, bearing date previous to 1st January, 1843; and 2d, the payment of all taxes on all the lands embraced within the exterior lines of the Martin grant—except the 6,786 acres reserved, up to and including the year 1842. And this claim was put into an instruction asked for by him and refused by the court.

By reference to section 3 of the Act referred to, it will be seen, that the benefit of the forfeited title is transferred, "for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the Commonwealth bearing date previous to the 1st day of January, 1843." The Martin grant excepts for such prior claims, 6,786 acres, and with the exception of this number of acres, Martin acquired legal title by his grant to the remaining part of the survey, to-wit: to 85,600 acres, which he paid for and which he and his grantees have paid the taxes thereon up to and including the year 1842.

The Act of June 2d, 1788, (2 Rev. Code, 434,) authorized and empowered the Governor to issue grants, with reservations of claims to lands included within such survey. The "reservation" is based on the certificate of the surveyor and is carried into effect by the action of the Governor. If the "reservation" be specific (by name and quantities), then no question can be raised as to the land intended to be exempted.

If the reservation be for a specific number of acres (without name) the reservation is confined to that number of acres, and with these "exceptions," the grantee from the commonwealth procures legal title for the lands included within the exterior lines of his survey.

The instruction asked for by the defendants and given by the court, in substance declares that if the Gallatin and Savary grant under which the defendants claim, is older than the grant to Martin, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and if the Martin grant included any part of the land embraced in the Gallatin grant, then the jury should find that the portion of the Gallatin survey, within the Wilson survey, is part of the "excluded" land, and that Martin acquired no title to such land by his grant from the Commonwealth, and that they must find for the defendants; and that the plaintiff has acquired no title, or claim of title, to the land in controversy in this action, by virtue of the forfeiture of the Gallatin and Savary title; in other words, because the excepted land in the Martin grant was not specified (by name,) the reservation, although limited to a certain number of acres, covered every prior claim therein, no matter how may in number or what number of acres they cover. If this instruction be law, then if the Gallatin and Savary grant cover the entire Martin grant except 6,786 acres of "prior claims," covered by the Reed and Stewart and Thomas Edgar surveys, the grantee in the Martin grant would get no title whatever to any part of his survey—notwithstanding the fact, that there are but 6,786 acres excepted and reserved in the Martin grant, from its operation.

This is the logical effect of the instruction given by the court.

We maintain that the land excepted, in cases of this kind, depends upon the evidence in each particular case; that if it be specific (by name of claimants or by boundary,) so as to make it a question of law, it is a question for the court. On the other hand, if the excepted land be for a specific number

of acres, (without name or specific location,) and the plaintiff affirmatively accounts for the "prior claims" excepted in his grant, outside of the survey under which the defendant claims, as in this case, then the identification of the *excepted* land is a question of fact for the jury to decide from all the facts and circumstances in the case; and to deprive the jury of this right is to invade their special province.

As the land granted to Martin was not forfeited, and the taxes paid, the forfeited Gallatin and Savary title, to the extent of the land in controversy, inured to the grantees of the Martin title, under which the plaintiff claims.

In the case of Armstrong vs. Morrell, 14 Wallace, the trial court gave an instruction substantially as asked for by the plaintiff in this action, and said instruction was sustained by the supreme court. (14 Wal., 140.)

The court also erred in overruling the plaintiff's objections to the reading of the deed in evidence before the jury, on the trial of the action, from Alfred Beckley, commissioner, &c., to Mary Jones, dated the 4th day of April, 1843, because the proceedings had in Fayette county, and read in evidence, did not show Mary Jones to be the purchaser of the land described in said deed, and because the defendants produced no decree of court directing a deed to be made to her, &c., and in allowing said deed to be read in evidence. (Pages 17, 18.)

The secondary evidence on which said deed was admitted in evidence was not sufficient to warrant the reading of the same. (Page 16.)

A part of the interlock between the Martin grant for 85,600 acres and the Gallatin and Savary grant for 2,000 acres, was involved in the action between Bryan and Willard, reported in 21st W. Va. Reports, and the only "prior claims" within the Martin grant, proved on the trial of the action, was the 1,100 acres, caused by the overlapping of the Martin and Gallatin grants, and the court did right in saying to the jury that that portion, of the Gallatin grant within the Martin grant was *excepted*, &c. The Court of Appeals, however, in reviewing that case, in order to guard against misunderstand-

ing, said "the Wilson excepts for such prior claims 6,786 acres; and there is no evidence whatever that this 1,100 acres is not excepted, *nor that there is any other prior claims within said survey.*" (21 W. Va. R., 73.) In effect saying, that if it had been shown, as in the case of Halsted vs. Buster, that there were other "prior claims" within the survey, the decision might have been different.

Again, in the case of Bryan vs. Willard, the survey was proved to have been made on the 24th day of October, 1794, and 25th day of January, 1795, while in the case of Halsted vs. Buster, the last entry was proved to have been made on the 10th of April, 1795. (Page 20.)

We submit, therefore, that the court erred in refusing to give the instruction asked for by the plaintiff; that it erred, also, in giving the instruction asked for by the defendants; that it erred, also, in admitting to be read as evidence in the action, the copy of deed from Beckley, Com'r, to Mary Jones; that it erred, also, in overruling the plaintiff's motion to set aside the verdict of the jury and grant a new trial, as set out in Bill of Exceptions, No. 2. And for these reasons the judgment should be set aside and a new trial granted.

All of which is respectfully submitted.

JOHN HALSTED.

By A. BURLEW, *Attorney.*

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*N. B.*—The word "every" in the 12th line of printed record, on page 28, should be *any.*

The survey for the Martin grant was made the 14th of April, 1795. (See the grant on page 8.)

## APPENDIX.

In the cause of Patrick vs. Donnally, (10 W. Va. R., p. 387,) the patent involved contained 13,557 acres of "prior claims," the ~~acres~~ owners and boundaries of which were named and given, and 861 acres of other "prior claims," reserved generally, the owners of which ~~are~~ were not given. And one of the material questions was, whether or not the land in controversy, in that cause, was a part of the said 861 acres; and the Court of Appeals, in reviewing the trial of the cause, say, "that under the *facts* and *circumstances* in the cause, it may be reasonably inferred, in the absence of evidence to the contrary, that the land in controversy contains a part of the excepted and reserved land;" thus deciding, that the excepted land not defined by names of claimants or boundary, was a *question of fact*, under the facts and circumstances in the cause. (Page 416.)

The Commonwealth sold and received pay for 85,600 acres embraced in the grant to Benjamin Martin, and from the date of the grant to the present time, Martin and his assignees have paid the taxes on this land. If, therefore, the Commonwealth had parted with her title to any part of the land embraced in the Martin grant, not *excepted*, and has since acquired title to such land, by forfeiture or otherwise, it is but justice and equity that such title should enure to the benefit of the owners of the Martin grant. The same equitable rule should apply to the Commonwealth as governs such transactions between individuals.

JOHN HALSTED.

By A. BURLEW, *Attorney*.

## APPENDIX.

In the cause of Patrick vs. Donnally, (10 W. Va. R., p. 387,) the patent involved contained 13,557 acres of "prior claims," the ~~acres~~ owners and boundaries of which were named and given, and 861 acres of other "prior claims," reserved generally, the owners of which ~~are~~ were not given. And one of the material questions was, whether or not the land in controversy, in that cause, was a part of the said 861 acres; and the Court of Appeals, in reviewing the trial of the cause, say, "that under the *facts* and *circumstances* in the cause, it may be reasonably inferred, in the absence of evidence to the contrary, that the land in controversy contains a part of the excepted and reserved land;" thus deciding, that the excepted land not defined by names of claimants or boundary, was a *question of fact*, under the facts and circumstances in the cause. (Page 416.)

The Commonwealth sold and received pay for 85,600 acres embraced in the grant to Benjamin Martin, and from the date of the grant to the present time, Martin and his assignees have paid the taxes on this land. If, therefore, the Commonwealth had parted with her title to any part of the land embraced in the Martin grant, not *excepted*, and has since acquired title to such land, by forfeiture or otherwise, it is but justice and equity that such title should enure to the benefit of the owners of the Martin grant. The same equitable rule should apply to the Commonwealth as governs such transactions between individuals.

JOHN HALSTED.

By A. BURLEW, *Attorney*.

119-341

OCT 29 1886

# SUPREME COURT

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# UNITED STATES.

## OCTOBER TERM, 1886.

JOHN HALSTEAD, *Plaintiff Below and Plaintiff in Error,*

vs.

SARAH A. BUSTER, ET. AL.S., *Defendants Below and Defendants in Error.*

BRIEF OF COUNSEL OF DEFENDANTS IN ERROR.

THE KANAWHA GAZETTE PRINT, CHARLESTON, W. VA.

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BRIEF OF COUNSEL OF DEFENDANTS IN ERROR.

This writ of error was obtained by the plaintiff here, and plaintiff below from a judgment rendered by the District Court of the United States for the District of West Virginia, in favor of the defendants here in an action of ejectment lately pending in said District Court.

The plaintiff in error claimed under what is known as the Wilson survey, or grant of 85,600 acres, and the defendant under what is known and described as the Albert Gallatin and Savary de Valcoulon grant of 2,000 acres.

The Gallatin survey was founded on an entry made April 12th, 1785, (see printed record, page 21,) and survey of same made the 24th August, 1794, (see printed record, p. 13.) The patent issued upon the said survey on the 22nd day of July, 1795.

Its location and boundaries are admitted to be as shown upon plat exhibit "B" (printed record, p. 9.)

The Wilson or Martin grant is founded upon entries made the 24th day of October, 1794, and the 25th day of January, 1795, and a survey made in pursuance of said entries on the 14th day of April, 1795. The patent issued on the 1st day of January, 1796, and its location and the boundaries thereof, are admitted to be as shown on the said plat Exhibit "B."

The Wilson survey and grant included within its exterior boundaries a part of the Gallatin survey and grant, to-wit: The triangle formed by the line extending north 49½° west from the point A and marked on said Exhibit "B" "Back line of the Gallatin survey of 2,000 acres," and the line extending from the same point north 22° west marked on plat "Line of the Wilson survey" to point marked "Double chestnut."

The plaintiff in error claimed title to the tract marked on said plat "Forest Hill tract 2,000 acres, shaded in blue under the Wilson grant." And the defendants in error claimed under the Gallatin survey and grant, such portion of the aforesaid 2,000 acres tract as lies within the red lines marked "W. B. Buster."

The Gallatin survey and grant, as will be observed from the foregoing dates, is older and superior in date of entry and survey to the Wilson or Martin grant.

For non-payment of taxes assessed against the Gallatin, subsequently to the date of the Wilson grant, it is admitted the Gallatin title became forfeited to the Commonwealth of Virginia, and in 18—, the title acquired by the said Commonwealth under said forfeiture, was sold by the Commissioner of Forfeited Lands to the grantors of the defendants.

The plaintiff in error claimed at the trial that the purchasers at the sale made by the said commissioner, acquired no title to that portion of the Gallatin survey included within the boundaries of the Wilson survey; but that the forfeited title to such part of the Gallatin as the Wilson included, vested in the owners of the Wilson survey, and had pas-ed down to the plaintiff. His claim was founded on the 3rd section of an act of the General Assembly of Virginia, passed on the 22nd day of March, 1842, which is as follows:

"3. *And be it further enacted*, That all right, title and interest, which shall be vested in the Commonwealth in any lands or lots lying West of the Allegheny mountains, by reason of the non-payment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the Commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of Assembly heretofore enacted in reference to delinquent and omitted lands shall be, and the same are hereby absolutely transferred to, and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs or devisees) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the Commonwealth bearing date previous to the 1st day of January, 1843, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: *Provided*, That nothing in this section contained shall be construed to impair the right or title of any person or persons who shall *bona fide* claim said land by title, legal or equitable, derived from the Commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

And the plaintiff, in view of his said claim under said statute, prayed the Court to give to the jury an instruction as follows, to-wit:

"The Court instructs the jury, inasmuch as it is a conceded fact in this cause that the Gallatin survey of 2,000 acres which has been given in evidence by the defendants, and under which they claim was, at the date of the passage of the act of March 22d, 1842, concerning delinquent and forfeited lands, forfeited to the Commonwealth for the non-payment of taxes due thereon or for the failure of the owners to cause the same to be entered on the books of the commissioners of the proper counties and have the same charged with taxes according to law, that the said survey then was, by reason of such forfeiture, vested in the Commonwealth, and if the jury find from the evidence that the boundaries of the William *William* [Wilson] survey of 85,600 acres and the grant thereunder given in evidence by the plaintiff and

under which he claims included any part of the land embraced within the boundary of the said forfeited survey, and that the persons having just title or claim to said Wilson survey at the passage of the act aforesaid shall have paid all the taxes duly assessed and charged against them, and all taxes that ought to have been assessed or charged thereon from the time they acquired title thereto, then by virtue of the said act of March 22d, 1842, that portion of the forfeited survey embraced within the boundary of the Wilson survey, which has become and was vested in the Commonwealth, became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons under *bona fide* claim to any part of said land by title, legal equitable derived from the Commonwealth and on which the taxes has been fully paid up according to law."

Which the Court declined to give, but in lieu thereof, at the instance of the defendants gave to the jury the following instruction, to-wit:

"If the jury find from the evidence that the grant to Gallatin and Savary under which defendants claim, is older than the grant to Bdejamin Martin assignee of William Wilson, under which the plaintiff claims, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that any portion of the land in controversy is included within the calls of each of said grants, then the Court instructs the jury that that portion of the Gallatin and Savary survey within the said Martin survey was excepted and reserved in and from the operation of the Martin grant, and that the grant to said Martin, assignee, &c., vested in him no title or claim of title to so much of the Gallatin and Savary grant as was included within the limits of the said Martin grant, and that the plaintiff has acquired no title or claim of title to the land in controversy in this suit by virtue of the forfeiture of the Gallatin and Savary title to the Commonwealth of Virginia."

The refusal of the Court to give the instruction prayed for by the plaintiff, and its action in giving the instruction asked by the defendants, is in fact the sole error assigned in the cause.

The theory of the plaintiff in error is that the Wilson or Martin grant is a "Junior" grant of that portion of the Gallatin and Savary grant included in the boundaries of the Wilson or Martin grant. While the defendants maintain that such part of the Gallatin grant was neither granted nor intended to be

granted by the Wilson, or Martin grant, but that such portion was absolutely by the terms of the Martin grant, as well as a matter of law excepted and reserved from the Martin or Wilson grant, and that on the forfeiture of the Gallatin, the title of the entire Gallatin grant, including that part within the exterior boundaries of the Wilson or Martin grants, vested absolutely in the Commonwealth, and the party acquiring title from the Commonwealth after such forfeiture, obtained such absolute title from the Commonwealth.

The Martin grant is what is known in the land law of Virginia and West Virginia and also in Kentucky, as an "Inclusive grant." Such grants were first authorized by the act of the General Assembly of Virginia, passed on the 2nd day of June, 1788. 2 Rev. Code Va., 434, which is as follows:

> "Whereas, sundry surveys have been made in different parts of this Commonwealth, which include in the general courses thereof, sundry smaller tracts of prior claimants, and which in the certificates granted by the surveyors of the respective counties are reserved to such claimants; and the Governor or Chief Magistrate is not authorized by law to issue grants upon such certificates of surveys; for remedy whereof.
>
> "1. Be it enacted by the General Assembly, that it shall and may be lawful for the Governor to issue grants with reservations of claims to lands included within such survey, anything in any law to the contrary notwithstanding."

We maintain that older entries, surveys and grants included in whole, or in part within the exterior boundaries of grants issued under this statute, were reserved and excepted therefrom as fully as if such entries, surveys and grants had been entirely without the exterior boundaries of such grants, and the grantee took no title, or claim of title, under his grant to such entries, surveys or grants.

This statute, and the effect of the grants under it, have been repeatedly before the highest Courts of Virginia, West Virginia and Kentucky, as well as the Supreme Court of the United States. See

Hopkins vs. Ward 6 Munf. (Va.) 40.

Nichols vs. Carey 4 Rand. (Va.) 387.

Trotter vs. Newton 30 Gratt. (Va.) 582-9.

Patrick vs. Dryden 10 W. Va. 387.
Bryan vs. Willard 21 W. Va. 65.
Madison vs. Owens, 6 Litt. Select Cas. 281 (Ky.)
Scott vs. Ratcliff 5 Peters 81.
Armstrong vs. Morrill 14 Wall. 143.

And the law of the case as set forth in the defendant's instruction, has in each case been distinctly declared and announced.

This question was last before the Supreme Court of the United States in the above cited case of Armstrong vs. Morrill, (14 Wall. 143), and the conclusion of the Court therein is set forth in Syllabus 4 of the points decided in said case, which is as follows:

> "4. Under the Virginia Act of June 2nd, 1788, the Governor may issue grants of land with reservations of claims to land included in the survey, which grants pass no legal title to the lands excepted from the grants."

This case was on a writ of error from the District Court of West Virginia.

The case cited of Bryan vs. Willard (21 W. Va. 65) contains the latest adjudication of the Supreme Court of Appeals of West Virginia on this question, and the Court will observe from the reading of the case that it is the *identical* case involved in this writ of error. The plaintiff Bryan claiming under this same Wilson or Martin grant—the defendant Willard under the Gallatin, by virtue of a sale made by the Commissioner of delinquent or forfeited lands, and the land in controversy being a portion situated within the same triangle—being in fact near the "Double Chestnut" marked on the plat, and the instructions asked in that case are in substance identical with those asked in the case at bar. The trial Court there refused the plaintiff's instruction and gave the defendant's instructions as the Court did in this case, and the Supreme Court of West Virginia approved the action of the trial Court.

Under the Constitution of West Virginia its Supreme Court is required to prepare a Syllabus of the points adjudicated in each case concurred in by three of the Judges thereof, which is to be prefixed to the published report of the case. The syl-

labus prepared by the Court under this provision in this case of Bryan vs. Willard, is as follows:

"1. Under the Act of June, 1788, authorizing the Governor to issue grants with reservation of prior claims included within the boundaries thereof, the reservations in such grants under said Act exclude from their operation all lands held by prior claimants at the dates of the surveys on which such grants are founded within the exterior boundaries of the grants—whether the title was only inchoate or had been perfected by grants (p. 72.)

"2. Under an inclusive grant issued by virtue of said Act containing a general reservation of a specified quantity of land for prior claimants the grantee acquires no title whatever to the land so reserved. And in such case if the title of any such prior claimant becomes forfeited for non-entry or for the non-payment of taxes; the title thus forfeited will not vest in such inclusive grantee under the Act of March 22nd, 1842 (p. 74)."

The opinion of the Court in that case, so fully and completely covers the question in the case at bar, that we find no further room for argument.

All of which is respectfully submitted.

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